

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)
PLAINTIFF,)
VS.)
RAMESH SUNNY BALWANI,)
DEFENDANT.)
) CR-18-00258-EJD
) SAN JOSE, CALIFORNIA
) MARCH 11, 2022
) VOLUME 3
) PAGES 498 - 634

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
BY: JOHN C. BOSTIC
JEFFREY B. SCHENK
150 ALMADEN BOULEVARD, SUITE 900
SAN JOSE, CALIFORNIA 95113

BY: ROBERT S. LEACH
KELLY VOLKAR
1301 CLAY STREET, SUITE 340S
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTERS:

IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074
LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

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A P P E A R A N C E S: (CONT'D)

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FOR DEFENDANT BALWANI: ORRICK, HERRINGTON & SUTCLIFFE LLP
BY: SHAWN ESTRADA
SACHI SCHURICHT
THE ORRICK BUILDING
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BY: JEFFREY COOPERSMITH
AMANDA McDOWELL
701 FIFTH AVENUE, SUITE 5600
SEATTLE, WASHINGTON 98104

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BY: STEPHEN CAZARES
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LOS ANGELES, CALIFORNIA 90017

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BY: AMY WALSH
51 W 52ND STREET
NEW YORK, NEW YORK 10019

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14

ALSO PRESENT: OFFICE OF THE U.S. ATTORNEY
BY: MADDI WACHS, PARALEGAL
SARA SLATTERY, PARALEGAL

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16

UNITED STATES POSTAL INSPECTION SERVICE
BY: CHRISTOPHER MCCOLLOW

17

18

FEDERAL BUREAU OF INVESTIGATION
BY: MARIO C. SCUSSEL

19

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UNITED STATES FOOD & DRUG
ADMINISTRATION
BY: GEORGE SCAVDIS

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22

JURY CONSULTANT
BY: DAVID PERROTT

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1 SAN JOSE, CALIFORNIA MARCH 11, 2022

09:12AM 2 P R O C E E D I N G S

09:18AM 3 (COURT CONVENED AT 9:18 A.M.)

09:18AM 4 (PROSPECTIVE JURY PANEL OUT AT 9:18 A.M.)

09:19AM 5 THE COURT: GOOD MORNING EVERYONE. I APOLOGIZE FOR
09:19AM 6 THE BRIEF DELAY. LET'S GO ON THE RECORD IN 18-258,

09:19AM 7 UNITED STATES VERSUS RAMESH "SUNNY" BALWANI.

09:19AM 8 FOR THE GOVERNMENT WHO APPEARS?

09:19AM 9 MS. VOLKAR: GOOD MORNING, YOUR HONOR. KELLY VOLKAR
09:19AM 10 ON BEHALF OF THE GOVERNMENT.

09:19AM 11 I'M JOINED BY JEFF SCHENK, JOHN BOSTIC, ROBERT LEACH, AND
09:19AM 12 OUR CASE AGENT, CHRISTOPHER MCCOLLOW, AND OUR PARALEGAL,
09:19AM 13 MADDI WACHS.

09:19AM 14 THE COURT: THANK YOU. GOOD MORNING, EVERYONE.

09:19AM 15 FOR THE DEFENDANTS.

09:19AM 16 MR. COOPERSMITH: GOOD MORNING.

09:19AM 17 JEFF COOPERSMITH FOR MR. BALWANI, WHO IS PRESENT, AND MY
09:19AM 18 COLLEAGUES ARE PRESENT, AMY WALSH, STEPHEN CAZARES,
09:19AM 19 SHAWN ESTRADA --

09:19AM 20 MR. RAFAT: THE SOUND SYSTEM IS NOT ON.

09:19AM 21 THE COURT: JUST A SECOND, SIR. THANK YOU. I'M
09:19AM 22 SORRY.

09:19AM 23 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

09:19AM 24 JEFF COOPERSMITH FOR MR. BALWANI. HE'S PRESENT.

09:19AM 25 I'M JOINED BY MY COLLEAGUES AMY WALSH, SACHI SCHURICHT,

09:20AM 1 SHAWN ESTRADA, AARON BRECHER, AND AMANDA McDOWELL.

09:20AM 2 DAVID PERROTT, OUR JURY CONSULTANT, IS ALSO PRESENT.

09:20AM 3 THE COURT: THANK YOU. GOOD MORNING.

09:20AM 4 THIS IS THE DATE AND TIME SET TO HEAR A MOTION FILED BY

09:20AM 5 THE DEFENSE, IT'S DOCUMENT 1327, AND I HAVE READ THAT.

09:20AM 6 I'VE READ 1337, WHICH IS THE GOVERNMENT'S OPPOSITION, AND

09:20AM 7 THEN THE DEFENSE REPLY --

09:20AM 8 MR. RAFAT: YOUR HONOR, I APOLOGIZE FOR

09:20AM 9 INTERRUPTING. THE SOUND SYSTEM IS OFF, AND THAT MEANS THE

09:20AM 10 COURTHOUSE IS NOT PROVIDING ACCESS.

09:20AM 11 THE COURT: SIR, COULD YOU, FIRST OF ALL, STATE YOUR

09:20AM 12 NAME.

09:20AM 13 MR. RAFAT: THE SOUND SYSTEM IS NOT ON. THE COURT

09:20AM 14 IS DENYING --

09:20AM 15 THE COURT: WOULD YOU PLEASE STATE YOUR NAME?

09:21AM 16 MR. RAFAT: THE SOUND --

09:21AM 17 THE COURT: EXCUSE ME. COULD YOU CALL THE CSO UP

09:21AM 18 HERE AND MAYBE THEY CAN HELP THIS GENTLEMAN? I'M NOT ABLE TO

09:21AM 19 COMMUNICATE WITH HIM.

09:22AM 20 (PAUSE IN PROCEEDINGS.)

09:22AM 21 THE COURT: GOOD MORNING. I SEE A -- PARDON ME,

09:22AM 22 LADIES AND GENTLEMEN. I SEE ONE OF OUR COURT SECURITY OFFICER

09:23AM 23 IS PRESENT.

09:23AM 24 SIR, THERE WAS A GENTLEMAN HERE WHO WAS EXPRESSING SOME

09:23AM 25 CONCERN, AND I WANTED HIM TO SPEAK WITH YOU ABOUT HIS ISSUE,

09:23AM 1 AND THEN HAVE YOU LET ME KNOW WHAT HIS ISSUE WAS SO WE COULD
09:23AM 2 CORRECT IT.

09:23AM 3 COURT SECURITY OFFICER: OKAY, YOUR HONOR.

09:23AM 4 THE COURT: I BELIEVE HE'S LEFT THE COURTROOM NOW
09:23AM 5 UNFORTUNATELY. I CAN DESCRIBE HIM FOR YOU. HE'S A GENTLEMAN,
09:23AM 6 AND I THINK HE'S WEARING A T-SHIRT TODAY.

09:23AM 7 AND IF YOU SEE HIM, YES, IF YOU SEE HIM, COULD YOU MAYBE
09:23AM 8 INQUIRE AS TO WHAT IT IS THAT HE NEEDS US TO DO TO ASSIST HIM?
09:23AM 9 I WASN'T ABLE TO UNDERSTAND HIM.

09:23AM 10 COURT SECURITY OFFICER: YES. FINE. 6-FOOT
09:23AM 11 T-SHIRT?

09:23AM 12 THE COURT: YES.

09:23AM 13 COURT SECURITY OFFICER: I DO RECOGNIZE HIM.

09:23AM 14 THE COURT: THANK YOU VERY MUCH. AND MAKE SURE YOU
09:23AM 15 LET HIM KNOW THAT I'M HERE TO HELP HIM AND I WANT HIM TO
09:23AM 16 UNDERSTAND WHAT HIS ISSUE IS, BUT HE'S LEFT THE COURTROOM NOW.

09:23AM 17 GREAT. THANK YOU.

09:23AM 18 COURT SECURITY OFFICER: THANK YOU, YOUR HONOR.

09:24AM 19 THE COURT: ALL RIGHT. THANK YOU.

09:24AM 20 COUNSEL, YOU CAN TAKE YOUR MASKS OFF IF YOU WOULD LIKE.

09:24AM 21 MS. VOLKAR: THANK YOU, YOUR HONOR.

09:24AM 22 MR. BRECHER: THANK YOU, YOUR HONOR. I WAS JUST
09:24AM 23 ABOUT TO ASK.

09:24AM 24 GOOD MORNING, YOUR HONOR. AARON BRECHER FOR MR. BALWANI.

09:24AM 25 MR. COOPERSMITH: YOUR HONOR, I'M SORRY, COULD I

09:24AM 1 HAVE A QUICK CONVERSATION WITH MS. ROBINSON? THERE'S A
09:24AM 2 POTENTIAL ISSUE.

09:24AM 3 THE COURT: WITH WHO?

09:24AM 4 MR. COOPERSMITH: WITH MS. ROBINSON.

09:24AM 5 (DISCUSSION OFF THE RECORD.)

09:24AM 6 MR. COOPERSMITH: OKAY. I'M SORRY, YOUR HONOR.

09:24AM 7 THE COURT: THAT'S QUITE ALL RIGHT. YOU SHOULD PULL
09:24AM 8 THAT MICROPHONE OVER.

09:24AM 9 MR. BRECHER: YES, OF COURSE.

09:24AM 10 IS THAT BETTER, YOUR HONOR?

09:24AM 11 THE COURT: YES. THANK YOU.

09:24AM 12 MR. BRECHER: I EXPECT THE COURT IS QUITE FAMILIAR
09:24AM 13 WITH THE SUBSTANCE OF THE EVIDENCE THAT WAS ADMITTED IN THE
09:24AM 14 HOLMES TRIAL ABOUT THE ALTERATION OF THESE REPORTS ABOUT
09:24AM 15 THERANOS'S PARTNERSHIPS WITH VARIOUS PHARMACEUTICAL COMPANIES,
09:24AM 16 INCLUDING IN PARTICULAR THE ADDITION OF SOME OF THOSE
09:25AM 17 COMPANIES' LOGOS.

09:25AM 18 SO UNLESS YOUR HONOR HAS QUESTIONS ABOUT THAT, I THINK
09:25AM 19 I'LL DIVE RIGHT INTO THE ARGUMENT IF THE COURT DOESN'T MIND.

09:25AM 20 THE COURT: NO, PLEASE.

09:25AM 21 MR. BRECHER: AS THE COURT MAY HAVE SEEN FROM OUR
09:25AM 22 PAPERS, THE HOLMES JURY FOUND THIS EVIDENCE HIGHLY SIGNIFICANT
09:25AM 23 AS TO THE QUESTION OF INTENT IN REACHING ITS DECISION.

09:25AM 24 BUT THE GOVERNMENT CANNOT BRING THAT EVIDENCE INTO THIS
09:25AM 25 TRIAL, AND THAT'S BECAUSE DOING SO WOULD RISK CONFUSING THE

09:25AM 1 JURY BY PAINTING A MISLEADING PICTURE OF MR. BALWANI'S ROLE,
09:25AM 2 AND IT WOULD ALSO FAIL TO SATISFY THE STANDARDS REQUIRED FOR A
09:25AM 3 VICARIOUS LIABILITY THEORY.

09:25AM 4 NOW, THE GOVERNMENT HAS TWO THEORIES THAT ITS OPPOSITION
09:25AM 5 BRIEF HAS PROFFERED. THE FIRST IS THAT THERE IS SUFFICIENT
09:25AM 6 CIRCUMSTANTIAL EVIDENCE TO SUGGEST THAT MR. BALWANI HAD DIRECT
09:25AM 7 PERSONAL KNOWLEDGE OF THESE CHANGES AND THAT THEY WERE
09:25AM 8 UNAUTHORIZED.

09:25AM 9 AND THE SECOND THEORY IS THAT THE EVIDENCE IS ADMISSIBLE
09:25AM 10 UNDER A VICARIOUS LIABILITY THEORY AS THE ACTS OF A -- EXCUSE
09:25AM 11 ME, OF A COSCHEMER OR COCONSPIRATOR.

09:26AM 12 BUT I THINK THE GOVERNMENT IS MISTAKEN ON BOTH OF THOSE
09:26AM 13 THEORIES, AND I'D LIKE TO START WITH THE FIRST.

09:26AM 14 AS YOUR HONOR KNOWS, THE NINTH CIRCUIT IN THE PHILLIPS
09:26AM 15 DECISION, WHICH I KNOW HAS BEEN CITED EXTENSIVELY THROUGHOUT
09:26AM 16 THESE PROCEEDINGS, SAID YOU CANNOT IMPUTE KNOWLEDGE OR INTENT
09:26AM 17 TO A COSCHEMER OR A COCONSPIRATOR. THAT HAS TO BE SHOWN
09:26AM 18 PERSONALLY.

09:26AM 19 AND IT IS ERROR TO ADMIT EVIDENCE OF PURPORTEDLY FALSIFIED
09:26AM 20 EVIDENCE WITHOUT SOME SHOWING THAT THE DEFENDANT KNEW, HAD
09:26AM 21 ACTUAL KNOWLEDGE, NOT IMPUTED KNOWLEDGE, ABOUT THAT FALSITY.

09:26AM 22 I DON'T SEE HOW THE GOVERNMENT CAN GET TO WHERE THEY CLAIM
09:26AM 23 THEY WANT TO BE ON THAT THEORY, AND THAT'S WHERE I'M STARTING.

09:26AM 24 YOUR HONOR, THERE IS NOT ONE IOTA OF EVIDENCE THAT
09:26AM 25 MR. BALWANI KNEW OF AN UNAUTHORIZED CHANGE TO ANY OF THESE

09:26AM 1 REPORTS.

09:26AM 2 MR. BALWANI HAD ALMOST NO CONTACT WITH THESE

09:26AM 3 PHARMACEUTICAL COMPANIES. THOSE RELATIONSHIPS WERE MANAGED BY

09:27AM 4 MS. HOLMES.

09:27AM 5 INDEED, AS THE GOVERNMENT HAS POINTED OUT IN ITS BRIEFING

09:27AM 6 AND AS THEY INTRODUCED AT THE HOLMES TRIAL, MANY OF THESE

09:27AM 7 RELATIONSHIPS, THE PARTNERSHIPS THAT LED TO THESE REPORTS HAD

09:27AM 8 EITHER REACHED THEIR CONCLUSION OR WERE ON THEIR WAY TO THEIR

09:27AM 9 CONCLUSION BY THE TIME MR. BALWANI EVEN JOINED THE COMPANY.

09:27AM 10 MR. BALWANI ALSO RECEIVED, BEFORE HE JOINED THERANOS IN

09:27AM 11 SEPTEMBER 2009, A COMMUNICATION IN AUGUST 2009 TELLING HIM THAT

09:27AM 12 THERANOS'S TECHNOLOGY HAD BEEN, QUOTE, ROBUSTLY VALIDATED BY

09:27AM 13 ITS PHARMACEUTICAL PARTNERS AND IDENTIFYING THESE VERY SAME

09:27AM 14 COMPANIES.

09:27AM 15 IN OTHER WORDS, YOUR HONOR, MR. BALWANI GOT THE SAME

09:27AM 16 REPRESENTATION THAT THE INVESTORS LATER GOT ABOUT

09:27AM 17 PHARMACEUTICAL COMPANIES COMPREHENSIVELY VALIDATING THERANOS'S

09:27AM 18 TECHNOLOGY.

09:27AM 19 WE KNOW THAT THERE'S NO EVIDENCE THAT MR. BALWANI EVER SAW

09:27AM 20 WHAT I'LL CALL THE ORIGINAL OR UNALTERED VERSIONS OF THE GSK,

09:27AM 21 THE GLAXOSMITHKLINE REPORT, OR OF THE PFIZER REPORT.

09:27AM 22 AS FOR THE SCHERING-PLOUGH REPORT, THE GOVERNMENT SEEMS TO

09:28AM 23 HANG ITS HAT ON A SINGLE EMAIL, MARCH 19TH, 2010, IN WHICH

09:28AM 24 MR. BALWANI IS COPIED AND HE'S -- AND THAT ATTACHMENT IS THE

09:28AM 25 UNALTERED VERSION OF THE SCHERING-PLOUGH REPORT.

09:28AM 1 AND THEN A MONTH LATER, ON APRIL 14TH, 2010, THERE'S AN
09:28AM 2 EMAIL TO WALGREENS ON WHICH MR. BALWANI IS ALSO COPIED THAT
09:28AM 3 CONTAINS THE -- TO USE MR. SCHENK'S TERMS IN THE CLOSING
09:28AM 4 ARGUMENT IN THE HOLMES TRIAL, THE ENHANCED VERSION OF ALL THREE
09:28AM 5 REPORTS. THAT'S PRETTY MUCH IT.

09:28AM 6 AND FROM THAT SINGLE INCIDENCE, THE GOVERNMENT
09:28AM 7 EXTRAPOLATES A THEORY UNDER WHICH A JURY COULD FAIRLY CONCLUDE
09:28AM 8 THAT MR. BALWANI WOULD HAVE SEEN THE PRESENCE OR ABSENCE OF A
09:28AM 9 LOGO IN AN ATTACHMENT A MONTH APART AND ATTACHED SOME SORT OF
09:28AM 10 SIGNIFICANCE TO THAT TO SUGGEST HE KNEW IT WAS UNALTERED -- OH,
09:28AM 11 I'M SORRY, YOUR HONOR.

09:28AM 12 THE COURT: NO. GO AHEAD.

09:28AM 13 MR. BRECHER: FRANKLY, YOUR HONOR, I JUST DON'T
09:28AM 14 THINK THAT THAT HOLDS WATER, AND I THINK IN ANOTHER CONTEXT THE
09:29AM 15 GOVERNMENT WOULD AGREE. AND, INDEED, THEY HAVE SHOWN THEIR
09:29AM 16 AGREEMENT WITH THIS GENERAL PRINCIPLE IN BOTH WORD AND DEED.

09:29AM 17 I'LL START WITH WORD. YOUR HONOR WILL LIKELY REMEMBERS
09:29AM 18 THAT MS. HOLMES'S TESTIMONY IN HER OWN TRIAL WAS THAT SHE DID
09:29AM 19 NOT BELIEVE SHE HAD DONE ANYTHING WRONG AND BY SHARING THE
09:29AM 20 ENHANCED VERSIONS OF AT LEAST THE PFIZER AND THE GSK REPORTS
09:29AM 21 WITH THOSE RESPECTIVE COMPANIES, THERE COULDN'T HAVE BEEN ANY
09:29AM 22 INTENT TO DEFRAUD.

09:29AM 23 BUT HERE'S WHAT MR. SCHENK HAD TO SAY ABOUT THAT AT
09:29AM 24 CLOSING ARGUMENT. HE SAID, QUOTE, "MS. HOLMES TOLD YOU ON THE
09:29AM 25 STAND THAT SHE APPLIED THE LOGOS TO THOSE DOCUMENTS. I THINK

09:29AM 1 FROM THAT TO SUGGEST I NEVER WOULD HAVE INTENDED, THOUGHT I WAS

09:29AM 2 DEFRAUDING ANYBODY IF I HAD GIVEN IT BACK TO THE PHARMA

09:29AM 3 COMPANIES."

09:29AM 4 BUT THEN HE GOES ON. "IT CERTAINLY ISN'T ON THE PHARMA

09:29AM 5 COMPANIES TO DISCOVER THAT AND TO REPORT IT BACK TO THERANOS."

09:29AM 6 YOUR HONOR, IN OTHER WORDS, ACCORDING TO THE GOVERNMENT,

09:29AM 7 EVEN THOUGH THE ENHANCED VERSIONS ARE SHARED WITH THE VERY SAME

09:29AM 8 COMPANY WHO'S RESPONSIBLE FOR THESE RELATIONSHIPS AND WHO HAS

09:29AM 9 THE AUTHORITY TO GIVE THERANOS PERMISSION TO USE THEIR LOGOS,

09:30AM 10 THERE'S NO REASON TO BELIEVE THAT THEY WOULD HAVE DISCOVERED

09:30AM 11 IT, EVEN THOUGH IT WAS SENT TO THEM.

09:30AM 12 THAT IS A PRETTY SHARP CONTRAST TO WHAT THE GOVERNMENT IS

09:30AM 13 ARGUING HERE, WHERE MR. BALWANI IS SOMEHOW SUPPOSED TO DIVINE

09:30AM 14 SOME UNAUTHORIZED USE FROM TWO EMAILS A MONTH APART.

09:30AM 15 BUT THE SECOND EXAMPLE, YOUR HONOR, FRANKLY COMES FROM THE

09:30AM 16 GOVERNMENT'S BRIEFING IN THIS VERY MOTION. ITS OPPOSITION SAYS

09:30AM 17 AT LEAST THREE TIMES THAT IN FEBRUARY 2010, SO NOT MARCH,

09:30AM 18 MR. BALWANI SAVED A COPY OF THE UNALTERED SCHERING-PLOUGH

09:30AM 19 REPORT, AND THEY CITE A METADATA STRING.

09:30AM 20 I'M SORRY TO SAY, YOUR HONOR, THE GOVERNMENT IS MISTAKEN

09:30AM 21 AND THEY MISINTERPRETED WHAT THAT DATA MEANS. THE GOVERNMENT

09:30AM 22 CLAIMS THERE'S A DATE CREATED FIELD, WHICH IS RIGHT, WHICH SAYS

09:30AM 23 FEBRUARY 10TH OR FEBRUARY 12TH OF 2010. THAT'S TRUE.

09:30AM 24 BUT THAT FIELD DOES NOT TELL YOU THAT MR. BALWANI SAVED IT

09:30AM 25 ON THAT DATE.

09:31AM 1 NOW, I KNOW MOST NORMAL PEOPLE DON'T FIND METADATA QUITE

09:31AM 2 AS SCINTILLATING AS I DO, SO I'LL TRY TO OFFER A MORE CONCRETE

09:31AM 3 EXAMPLE.

09:31AM 4 MANY JUDGES THROUGHOUT THE COUNTRY HAVE CHAMBERS

09:31AM 5 PROCEDURES ABOUT HOW THEY LIKE EXHIBITS MARKED AND THE LIKE.

09:31AM 6 IF MS. ROBINSON WOULD SEND ME AN EMAIL TODAY WITH

09:31AM 7 YOUR HONOR'S CHAMBERS PROCEEDING AND THAT DOCUMENT WERE CREATED

09:31AM 8 IN JANUARY OF 2017, THE GOVERNMENT COULD HAVE THE SAME

09:31AM 9 METADATA, THE EXACT SAME EVIDENCE, AND TELL YOU THAT I

09:31AM 10 DOWNLOADED THAT DOCUMENT TO MY LAW FIRM SERVER IN JANUARY 2017,

09:31AM 11 BUT OBVIOUSLY THAT'S NOT TRUE BECAUSE MS. ROBINSON WAS NOT

09:31AM 12 WORKING IN YOUR CHAMBERS AT THAT TIME AND I WASN'T WORKING IN

09:31AM 13 MY CURRENT FIRM AT THAT TIME.

09:31AM 14 BUT WE DON'T NEED TO GUESS, AND THE COURT DOES NOT NEED TO

09:31AM 15 GUESS ABOUT WHAT THIS DATE MEANS OR WHAT IT COULD MEAN, BECAUSE

09:31AM 16 WE KNOW FROM THE FILE PATH WHAT IT MEANS. THE FILE PATH

09:31AM 17 INCLUDES THE SUBJECT LINE OF THE MARCH 2010 EMAIL HEADER, RE:

09:31AM 18 TIMES TO TALK. THAT'S THE PARENT DOCUMENT. THAT IS THE SOURCE

09:31AM 19 OF THE UNDERLYING ATTACHMENT.

09:32AM 20 NOW, YOUR HONOR, I'M NOT SUGGESTING THAT THIS MATTERS TO

09:32AM 21 THE ARGUMENTS. I DON'T THINK WHETHER MR. BALWANI GOT IT IN

09:32AM 22 FEBRUARY OR GOT IT IN MARCH, I DON'T THINK ANYTHING TURNS ON

09:32AM 23 THAT.

09:32AM 24 BUT IT'S A TELLING POINT, YOUR HONOR, BECAUSE THE

09:32AM 25 GOVERNMENT LOOKED AT THIS INFORMATION, THEY EXAMINED IT

09:32AM 1 CLOSELY, THE FILE PATH IS A VERY SHORT STRING OF WORDS, AND
09:32AM 2 THEY DREW A CONCLUSION THAT TURNED OUT TO BE INCORRECT, AND
09:32AM 3 THEY REPEATED IT NUMEROUS TIMES IN THEIR BRIEF.
09:32AM 4 I THINK THAT'S A PERFECTLY INNOCENT MISTAKE, AND I'M
09:32AM 5 CONFIDENT THE GOVERNMENT WOULD AGREE.
09:32AM 6 IF I WERE TO SUGGEST THAT IT WERE ANYTHING OTHER THAN A
09:32AM 7 MISTAKE, THAT IT CASTS DOUBT SOMEHOW ON THE INTEGRITY OF THE
09:32AM 8 GOVERNMENT'S SUBMISSIONS, I THINK IT WOULD RUFFLE SOME FEATHERS
09:32AM 9 WITH MY FRIENDS ON THE OTHER SIDE.
09:32AM 10 BUT THE INFERENCES THERE ARE ORDERS OF MAGNITUDE STRONGER
09:32AM 11 THAN WHAT THEY'RE ASKING THE JURY TO SAY ABOUT MR. BALWANI,
09:32AM 12 THAT HE SHOULD HAVE NOTICED, THAT THE JURY CAN FAIRLY CONCLUDE
09:32AM 13 THAT HE DID NOTICE THE PRESENCE OR ABSENCE OF A LOGO ON
09:32AM 14 DOCUMENTS THAT HE RECEIVED A MONTH APART. IT JUST SEEMS ABSURD
09:32AM 15 TO ME, AND I THINK THAT PHILLIPS FORBIDS THAT KIND OF SHOWING.
09:33AM 16 MOVING ON TO VICARIOUS LIABILITY, YOUR HONOR, IT'S A
09:33AM 17 PRETTY SCARY CONCEPT, TO BE FRANK, YOU KNOW, THE IDEA OF BEING
09:33AM 18 CRIMINALLY RESPONSIBLE FOR SOMETHING THAT SOMEONE ELSE DOES.
09:33AM 19 AND THE LAW RECOGNIZES THAT SCARINESS. THAT'S WHY THERE
09:33AM 20 ARE IMPORTANT GUARDRAILS AROUND WHEN IT'S APPROPRIATE TO HOLD
09:33AM 21 SOMEONE ACCOUNTABLE FOR THE ACTS OF ANOTHER.
09:33AM 22 IN THIS CASE THE RELEVANT CATEGORIES ARE COCONSPIRATOR
09:33AM 23 LIABILITY AND COSCHEMER LIABILITY.
09:33AM 24 BUT IN ORDER FOR THAT TO COME BEFORE A JURY, YOUR HONOR
09:33AM 25 MUST FIND BY A PREPONDERANCE OF THE EVIDENCE THAT THE ELEMENTS,

09:33AM 1 THE NECESSARY ELEMENTS OF THOSE SHOWINGS HAVE BEEN MET.

09:33AM 2 AND THE TENOR OF THE GOVERNMENT'S OPPOSITION SUGGEST THAT

09:33AM 3 YOUR HONOR CAN JUST LOOK AT A FEW DISPARATE FACTS AND STRING

09:33AM 4 TOGETHER A FEW INFERENCES, SOME SPECULATION, AND SORT OF SHAKE

09:33AM 5 IT IN A BOX AND SAY, WELL, I GUESS IT'S A JURY QUESTION.

09:33AM 6 BUT THAT'S NOT WHAT THE LAW REQUIRES. THE LAW REQUIRES

09:34AM 7 THE COURT TO LOOK AT ALL OF THE FACTS PROFFERED BY THE PARTIES

09:34AM 8 IN WHATEVER FORMAT YOUR HONOR CHOOSES TO CONSIDER THE RULE 104

09:34AM 9 ISSUE AND DECIDE ON A PREPONDERANCE STANDARD.

09:34AM 10 SO WHAT IS THERE? THE GOVERNMENT'S BRIEF TELLS YOU ABOUT

09:34AM 11 A HOST OF CONDUCT IN BOTH TESTIMONY AND DOCUMENTS FROM

09:34AM 12 NOVEMBER 2013 TO OCTOBER OF 2015.

09:34AM 13 YOUR HONOR, NONE OF THAT TELLS US ABOUT WHETHER THERE WAS

09:34AM 14 A CONSPIRACY OR SCHEME TO DEFRAUD IN APRIL 2010, AND ANY

09:34AM 15 SUGGESTION TO THE CONTRARY DEFIES NOT ONLY THE LAWS OF

09:34AM 16 EVIDENCE, BUT THE LAWS OF REASON, AND NOT TO MENTION SPACE AND

09:34AM 17 TIME, FRANKLY.

09:34AM 18 WHAT WE HAVE IN 2010 IS MR. BALWANI WORKED AT THERANOS.

09:34AM 19 MR. BALWANI WAS IN CHARGE AND HELPED LEAD THE RETAIL

09:34AM 20 PARTNERSHIPS, AND MR. BALWANI AND MS. HOLMES WERE IN A ROMANTIC

09:34AM 21 PARTNERSHIP. THAT'S IT.

09:34AM 22 I DON'T THINK THAT THAT WOULD EVEN SURVIVE A SUMMARY

09:35AM 23 JUDGMENT MOTION IN A CIVIL CASE, YOUR HONOR.

09:35AM 24 WHAT THE GOVERNMENT IS ASKING YOU TO DO IS NOT TO DRAW

09:35AM 25 INFERENCES IN THEIR FAVOR -- AND, AGAIN, THIS IS NOT SOME

09:35AM 1 RULE 29 MOTION WHERE THE COURT IS REQUIRED TO DO SO.

09:35AM 2 THEY'RE ASKING FOR LEAPS ACROSS THESE HUGE EVIDENTIARY

09:35AM 3 GAPS THAT THEY DON'T FILL WITH ANYTHING AND THEY TRY TO

09:35AM 4 BACKFILL WITH EVIDENCE FROM LITERALLY YEARS LATER.

09:35AM 5 THAT'S NOT GOOD ENOUGH, YOUR HONOR.

09:35AM 6 THE COURT WOULD ALSO HAVE TO CONSIDER NOT JUST THE

09:35AM 7 GOVERNMENT'S EVIDENCE, BUT THE COMPLETE PICTURE. THE COURT

09:35AM 8 WOULD HAVE TO CONSIDER -- AND THE GOVERNMENT DOESN'T GRAPPLE

09:35AM 9 WITH THIS IN THEIR OPPOSITION -- THE EXCULPATORY AUGUST 2009

09:35AM 10 COMMUNICATION TO MR. BALWANI TELLING HIM EXACTLY WHAT INVESTORS

09:35AM 11 LATER HEARD, THAT PHARMACEUTICAL COMPANIES HAD ROBUSTLY

09:35AM 12 VALIDATED THE TECHNOLOGY.

09:35AM 13 FRANKLY, THE COURT WOULD HAVE TO CONSIDER OTHER ISSUES,

09:35AM 14 LIKE MR. BALWANI WAS LARGELY IN THAILAND FOR MANY OF HIS EARLY

09:35AM 15 MONTHS AT THE COMPANY, INCLUDING A TRIP FROM MID-FEBRUARY TO

09:35AM 16 EARLY MARCH.

09:35AM 17 THE COURT WOULD HAVE TO CONSIDER HIS DISTANCE CONCEPTUALLY

09:35AM 18 FROM THE PHARMACEUTICAL RELATIONSHIP, SOMETHING THAT MS. HOLMES

09:36AM 19 MANAGED AND NOT HIM.

09:36AM 20 AND WE KNOW THAT THAT'S NOT ENOUGH. WE KNOW THAT'S NOT

09:36AM 21 ENOUGH BECAUSE OF YOUR OWN JURY INSTRUCTIONS IN THE HOLMES

09:36AM 22 TRIAL THAT A MERE BUSINESS PARTNERSHIP OR A MERE ROMANTIC

09:36AM 23 PARTNERSHIP WITHOUT MORE IS NOT ENOUGH TO SHOW A CONSPIRACY.

09:36AM 24 SO I DON'T THINK THE GOVERNMENT CAN GET THERE.

09:36AM 25 AND THEN LAST, YOUR HONOR, EVEN IF THE COURT IS INCLINED

09:36AM 1 TO DISAGREE WITH ME ON ONE OR MORE OF THOSE THEORIES, I THINK
09:36AM 2 RULE 403 BARS THE EVIDENCE, AND THAT'S BECAUSE WE HAVE THIS NEW
09:36AM 3 CONTEXT OF MS. HOLMES'S TESTIMONY.

09:36AM 4 MR. BALWANI FACES A RANGE OF CHARGES, TWO CONSPIRACY
09:36AM 5 COUNTS, BUT ALSO TEN MORE SUBSTANTIVE WIRE FRAUD COUNTS.

09:36AM 6 AND THE JURY CAN REACH DIFFERENT DECISIONS ON EACH OF
09:36AM 7 THOSE COUNTS AND, INDEED, THE HOLMES JURY DID SO, DIVIDING IT
09:36AM 8 SORT OF A THREE-WAY SPLIT, AS IT WERE, IN POSSIBLE OUTCOMES.

09:36AM 9 IF THE JURY DOES NOT UNDERSTAND THE FULL CONTEXT THAT IS
09:36AM 10 NOW AVAILABLE TO THE PARTIES, IT DANGEROUSLY INVITES THEM TO
09:37AM 11 SPECULATE, AND THAT'S WHAT IT WOULD BE, THAT IT WAS MR. BALWANI
09:37AM 12 WHO PERSONALLY PERFORMED THESE ACTS. BUT THERE'S NO ADMISSIBLE
09:37AM 13 WAY OF OFFERING THE JURY THE REQUIRED CONTEXT WITHOUT
09:37AM 14 SACRIFICING MR. BALWANI'S CONFRONTATION RIGHTS.

09:37AM 15 MS. HOLMES TESTIFIED THAT SHE DID IT, BUT AS THE
09:37AM 16 GOVERNMENT POINTS OUT QUITE RIGHTLY IN ITS BRIEF, SHE DOESN'T
09:37AM 17 SAY WHETHER OR NOT MR. BALWANI KNEW.

09:37AM 18 AND THERE'S A REASON WE DON'T KNOW THE ANSWER TO THAT.
09:37AM 19 IT'S BECAUSE MR. LEACH, WHEN HE WAS QUITE EFFECTIVELY
09:37AM 20 CROSS-EXAMINING MS. HOLMES, LACKED ANY INCENTIVE TO ASK HER
09:37AM 21 THAT QUESTION.

09:37AM 22 AND MR. BALWANI, WHO WAS NOT PRESENT, LACKED THE
09:37AM 23 OPPORTUNITY TO ASK HER THAT QUESTION.

09:37AM 24 THINGS MAY CHANGE IF SHE SHOWS UP ON A WITNESS LIST AND
09:37AM 25 TESTIFIES. BUT UNLESS THAT HAPPENS, THAT CRITICAL CONTEXT

09:37AM 1 NECESSARY FOR THE JURY TO UNDERSTAND WHO DID WHAT AND WHAT WERE
09:37AM 2 THE ROLES, IT WON'T COME INTO THE CASE.

09:37AM 3 AND IT'S A PRETTY SCARY HYPOTHETICAL WHEN YOU SORT OF SPIN
09:37AM 4 OUT WHAT WOULD HAPPEN.

09:37AM 5 BEFORE THE HOLMES TESTIMONY, THE GOVERNMENT'S PLAN, AND I
09:37AM 6 THINK IT WAS THE PLAN THAT THEY WERE EXECUTING IN THE HOLMES
09:38AM 7 TRIAL, WAS PERFECTLY ABOVE BOARD, RIGHT? YOU PRESENT TO THE
09:38AM 8 JURY, HERE'S THE BEFORE VERSION OF THE PHARMACEUTICAL REPORT,
09:38AM 9 HERE'S THE AFTER. THESE PHARMA WITNESSES ARE GOING TO SAY, WE
09:38AM 10 DIDN'T AUTHORIZE THESE CHANGES AND TO OUR KNOWLEDGE THEY
09:38AM 11 WEREN'T AUTHORIZED. MEMBERS OF THE JURY, HERE'S AN EMAIL FROM
09:38AM 12 MS. HOLMES, YOU DRAW YOUR OWN CONCLUSION.

09:38AM 13 AND THAT WOULD BE FINE.

09:38AM 14 BUT NEW FACTS MEAN NEW LEGAL CONSEQUENCES. NOW WE KNOW
09:38AM 15 MORE.

09:38AM 16 AND IT WOULD BE PATENTLY UNFAIR TO INVITE THE JURY TO LOOK
09:38AM 17 AT THE ONLY DEFENDANT WHO IS GOING TO BE IN FRONT OF THEM, AND
09:38AM 18 THAT'S MY CLIENT, AND SAY, YOU KNOW WHAT, MAYBE HE DID IT, WHEN
09:38AM 19 THE GOVERNMENT KNOWS THAT'S NOT TRUE, THE COURT -- AND I KNOW
09:38AM 20 YOUR HONOR WOULD BE DUTY BOUND TO SORT OF SIT IMPASSIVELY AND
09:38AM 21 NOT COMMENT ON THE EVIDENCE -- KNOWS IT'S NOT TRUE, AND THE
09:38AM 22 DEFENSE KNOWS IT'S NOT TRUE.

09:38AM 23 THE ONLY ONE SORT OF BEING MISLED HERE WOULD BE THE JURY.

09:38AM 24 JUST WRAPPING UP, HERE, YOUR HONOR, I REALLY THINK IT'S
09:38AM 25 IMPORTANT TO EMPHASIZE JUST HOW NARROW THE RELIEF THAT WE'RE

09:39AM 1 REQUESTING IS. THE GOVERNMENT MADE SOME ALLUSION IN ITS
09:39AM 2 OPPOSITION TO THE NOTION OF THIS EVIDENCE BEING OFFERED TO
09:39AM 3 PROVE THE FALSITY OF REPRESENTATIONS LATER MADE TO INVESTORS.
09:39AM 4 THAT'S FINE. BOTH PARTIES HAVE A PERFECTLY LEGITIMATE
09:39AM 5 INTEREST IN RELYING ON EVIDENCE ABOUT THERANOS'S RELATIONSHIP
09:39AM 6 WITH THESE PHARMACEUTICAL COMPANIES.
09:39AM 7 FROM THE DEFENSE PERSPECTIVE, IT'S FOR MR. BALWANI'S
09:39AM 8 INTENT. IT'S WHAT HE WAS BEING TOLD IN REALTIME.
09:39AM 9 AND FROM THE GOVERNMENT'S PERSPECTIVE, IT'S FALSITY. IT'S
09:39AM 10 THERANOS TOLD INVESTORS OUR TECHNOLOGY HAS BEEN COMPREHENSIVELY
09:39AM 11 VALIDATED BY PHARMACEUTICAL COMPANIES.
09:39AM 12 IF THE GOVERNMENT WANTS TO OFFER EVIDENCE TO SUGGEST THAT
09:39AM 13 THAT'S NOT TRUE, PERFECTLY FAIR GAME. WE MAY HAVE TRIAL
09:39AM 14 OBJECTIONS DEPENDING ON THE QUESTIONS OR THE PARTICULAR
09:39AM 15 EXHIBITS OFFERED, BUT WE'RE NOT HERE TRYING TO STOP THEM FROM
09:39AM 16 DOING THAT.
09:39AM 17 WE'RE ONLY ASKING FOR A FAIR EXCLUSION OF THIS VERY NARROW
09:39AM 18 CATEGORY OF EVIDENCE, THIS EVIDENCE OF DOCTORING WHICH THERE'S
09:39AM 19 NO TETHER WHATSOEVER TO MY CLIENT AND IT COULD BE INCREDIBLY
09:40AM 20 PREJUDICIAL FOR THE JURY.
09:40AM 21 THANK YOU, YOUR HONOR.
09:40AM 22 THE COURT: THANK YOU.
09:40AM 23 WOULD IT -- IF THE GOVERNMENT WERE TO INTRODUCE, VIA SOME
09:40AM 24 WITNESSES, THE FACT THAT, LET'S SAY FROM THE PHARMACEUTICAL
09:40AM 25 COMPANIES, EACH OF THE TWO, TWO DOCUMENTS, WHATEVER THEY ARE,

09:40AM 1 IS THIS YOURS? YES. DID YOU SEND THIS? YES. WHATEVER IT IS,

09:40AM 2 LAY A FOUNDATION FOR THE UNALTERED, I'LL JUST CALL IT THAT.

09:40AM 3 AND THEN ASK ABOUT THE OTHER ONE, WITHOUT ATTRIBUTION, DID

09:40AM 4 YOU RECEIVE THIS FROM MS. HOLMES? OR THE SOURCE OF IT, WHO DID

09:40AM 5 YOU GET THIS FROM? ELIZABETH HOLMES.

09:40AM 6 IS THAT ADMISSIBLE?

09:40AM 7 MR. BRECHER: NO, YOUR HONOR. AND THAT'S PRECISELY

09:40AM 8 THE CATEGORY OF EVIDENCE THAT WE THINK IS NOT ADMISSIBLE, AND

09:40AM 9 IT'S PRECISELY BECAUSE THE GOVERNMENT CANNOT SHOW ANY

09:40AM 10 FOUNDATION -- THERE'S NO SHOWING THAT MR. BALWANI MADE THESE

09:40AM 11 ALTERATIONS. THERE'S NO SHOWING THAT MR. BALWANI KNEW THESE

09:41AM 12 ALTERATIONS HAD BEEN MADE AT ALL, MUCH LESS WITHOUT

09:41AM 13 AUTHORIZATION.

09:41AM 14 THE COURT: SO YOU'RE SAYING IT'S NOT RELEVANT TO

09:41AM 15 YOUR CLIENT?

09:41AM 16 MR. BRECHER: THAT'S CORRECT, YOUR HONOR.

09:41AM 17 THE COURT: IT HAS RELEVANCE, BUT NOT TO YOUR

09:41AM 18 CLIENT.

09:41AM 19 MR. BRECHER: EXACTLY, YOUR HONOR.

09:41AM 20 IT COULD COME IN UNDER A THEORY OF VICARIOUS LIABILITY IF

09:41AM 21 THE GOVERNMENT COULD MAKE THAT SHOWING IN APRIL 2010, AND IF

09:41AM 22 THEY COULD GET OVER THE 403 HURDLE.

09:41AM 23 BUT I DON'T THINK THE GOVERNMENT CAN MAKE EITHER SUCH

09:41AM 24 SHOWING.

09:41AM 25 THE COURT: ARE THERE OTHER -- CAN YOU FATHOM ANY

09:41AM 1 OTHER REASON OR ANY OTHER METHOD OF ADMISSIBILITY FOR THOSE TWO
09:41AM 2 LETTERS THAT WE TALKED ABOUT, OR THESE DOCUMENTS THAT WE'RE
09:41AM 3 TALKING ABOUT?

09:41AM 4 IS THERE ANY OTHER METHOD THAT THOSE COULD COME IN?

09:41AM 5 MR. BRECHER: THE DOCUMENTS THEMSELVES?

09:41AM 6 THE COURT: YES.

09:41AM 7 MR. BRECHER: ABSOLUTELY, YOUR HONOR.

09:41AM 8 AGAIN, I'M NOT TRYING TO BAR THE GOVERNMENT FROM SHOWING
09:41AM 9 FALSITY. THE INVESTORS RECEIVED THESE DOCUMENTS, AND THE CORE
09:41AM 10 CLAIM IS THAT THERANOS HAS COMPREHENSIVELY VALIDATED THE
09:41AM 11 TECHNOLOGY, AND IF THEY WANT TO CALL OTHER WITNESSES OR PUT ON
09:41AM 12 OR USE OTHER EXHIBITS TO SUGGEST, NO, THAT'S NOT TRUE, THAT'S
09:41AM 13 FINE. THAT'S WHAT TRIALS ARE FOR. WE HAVE CROSS-EXAMINATION
09:42AM 14 FOR THAT.

09:42AM 15 I'M NOT HERE TRYING TO TIE THE GOVERNMENT'S HANDS. I'M
09:42AM 16 ASKING THAT THE FIGHT BE FAIR.

09:42AM 17 ONE WAY, AND I'M JUST THINKING OUT LOUD ABOUT THE
09:42AM 18 PRACTICALITIES, IS JUST AS YOUR HONOR FREQUENTLY DID IN THE
09:42AM 19 HOLMES TRIAL, AND JUST AS COURTS FREQUENTLY ORDER REDACTIONS OF
09:42AM 20 VARIOUS EXHIBITS ON 403 GROUNDS, AND ON FRANKLY ANY NUMBER OF
09:42AM 21 GROUNDS, THE COURT COULD IMPOSE THAT THE PARTIES CONFER ABOUT
09:42AM 22 AN AGREED UPON SORT OF UNIFORM VERSION OF THESE REPORTS, MAYBE
09:42AM 23 WITH JUST THE THERANOS LOGO OR NO LOGOS. I'M SORT OF
09:42AM 24 INDIFFERENT ON THAT, YOUR HONOR.

09:42AM 25 SO, NO, THE REPORTS CAN COME IN JUST FINE. IT'S EVIDENCE

09:42AM 1 AND ARGUMENTS ABOUT ALTERATION, ABOUT DOCTORING. THAT'S WHAT I
09:42AM 2 THINK HAS TO STAY OUT.

09:42AM 3 THE COURT: OKAY. I SEE. THANK YOU.

09:42AM 4 MR. BRECHER: THANK YOU, YOUR HONOR.

09:42AM 5 THE COURT: MS. VOLKAR.

09:42AM 6 MS. VOLKAR: THANK YOU, YOUR HONOR.

09:42AM 7 WHAT I HEARD MY COLLEAGUE SAY WERE SOME GREAT TOPICS FOR
09:42AM 8 CROSS-EXAMINATION AND CLOSING ARGUMENT.

09:42AM 9 BUT WHAT I DIDN'T HEAR ONCE, UNTIL YOUR HONOR JUST ASKED
09:43AM 10 THE QUESTION, WAS ANY THEORY FOR NOT ADMITTING THESE EXHIBITS.

09:43AM 11 YOUR HONOR ASKED ABOUT RELEVANCE. WE HAVE NOT ONCE HEARD
09:43AM 12 ABOUT ANYTHING ABOUT THE ACTUAL STANDARDS FOR ADMITTING THESE
09:43AM 13 DOCUMENTS, ARE THEY RELEVANT? ARE THEY UNDULY PREJUDICIAL?
09:43AM 14 ARE THEY HEARSAY?

09:43AM 15 THAT'S NOT THE BASIS OF THIS. THEIR MOTION IS ALMOST
09:43AM 16 ENTIRELY ABOUT VICARIOUS LIABILITY.

09:43AM 17 AS WE DESCRIBED IN OUR OPPOSITION, WE -- VICARIOUS
09:43AM 18 LIABILITY IS ON THE TABLE, AND I WILL GET THERE.

09:43AM 19 BUT WE THINK THAT THESE DOCUMENTS ARE RELEVANT TO
09:43AM 20 MR. BALWANI'S KNOWLEDGE, AND THERE ARE FACTS. I UNDERSTAND
09:43AM 21 THAT MY COLLEAGUE DISAGREES WITH A REASONABLE INFERENCE THAT
09:43AM 22 CAN BE DRAWN FROM THEM, BUT BOTH SIDES AGREE ON THE FACTS.

09:43AM 23 AND I THINK WHEN WE'RE IN THAT POSITION, AND I'M GOING TO
09:43AM 24 WALK THROUGH THEM IN JUST A MOMENT, WE'RE REALLY IN A POSITION
09:43AM 25 WHERE IT'S UP TO THE JURY, THE DECIDER OF FACTS, TO DECIDE

09:43AM 1 WHICH INFERENCE THEY BELIEVE.

09:43AM 2 NOW, WHAT ARE THOSE FACTS?

09:43AM 3 I KNOW MY COLLEAGUE WALKED THROUGH THEM AS WELL, SO I

09:43AM 4 DON'T WANT TO BELABOR THEM, BUT I DO WANT TO POINT OUT THERE

09:44AM 5 ARE TWO DIFFERENT VIEWS.

09:44AM 6 THE PARTIES, BOTH MR. BALWANI AND MS. HOLMES, WERE IN A

09:44AM 7 ROMANTIC RELATIONSHIP. WE KNOW AND WE SEE FROM THE TEXT

09:44AM 8 MESSAGES THAT DON'T GO BACK ALL OF THE WAY TO 2010 THAT THEY'RE

09:44AM 9 CONSTANTLY IN COMMUNICATION.

09:44AM 10 WE KNOW THAT THEY'RE CONSTANTLY DISCUSSING VARIOUS ASPECTS

09:44AM 11 OF THE COMPANY IN THAT ROMANTIC RELATIONSHIP.

09:44AM 12 SO IT'S NOT JUST, WHAT DO YOU WANT TO HAVE FOR DINNER

09:44AM 13 TONIGHT? THEY'RE TALKING ABOUT WHAT DO WE WANT TO HAVE GO TO

09:44AM 14 THIS INVESTOR? WHAT DO WE WANT IN THIS DECK? THEY'RE

09:44AM 15 CONSTANTLY TALKING ABOUT TOPICS RELATED TO THE BUSINESS.

09:44AM 16 HE JOINS THE COMPANY, AND WHAT IS THE FIRST THING HE DOES

09:44AM 17 WHEN HE JOINS THE COMPANY? HE'S GUARANTEEING WHAT IS AT LEAST

09:44AM 18 A \$10 MILLION LOAN. THERE'S SOME DOCUMENTS THAT SUGGEST THAT

09:44AM 19 IT'S MORE, AND HE'S GUARANTEEING A LOAN.

09:44AM 20 WHY WOULD YOU DO THAT?

09:44AM 21 HE MUST KNOW THE COMPANY IS STRUGGLING AND OUT OF MONEY.

09:44AM 22 SO HE'S JOINING THE COMPANY KNOWING IT'S STRUGGLING FINANCIALLY

09:44AM 23 AND PUTTING HIS OWN MONEY ON THE LINE THROUGH A PERSONAL

09:44AM 24 GUARANTEE OF A LOAN TO THE COMPANY THAT HIS GIRLFRIEND IS

09:45AM 25 RUNNING.

09:45AM 1 WHAT DOES HE GET IN RETURN?

09:45AM 2 HE GETS TO BE COO, AND HE GETS TO BE IN CHARGE OF THE

09:45AM 3 RETAIL RELATIONSHIPS. THAT INCLUDES WITH WALGREENS, WITH

09:45AM 4 SAFEWAY, AND AN ATTEMPT WITH WAL-MART.

09:45AM 5 WHAT IS AMONG THE FIRST THING HE DOES?

09:45AM 6 IN MARCH OF 2010, HE'S ON AN EMAIL THAT GOES TO WAL-MART

09:45AM 7 THAT INCLUDES AN UNALTERED REPORT.

09:45AM 8 AND THIS IS TRULY WHERE MY COLLEAGUE AND I PART WAYS,

09:45AM 9 BECAUSE I THINK -- I KNOW HE SPENT A DECENT AMOUNT OF TIME

09:45AM 10 TALKING ABOUT THE METADATA AND WHAT INFERENCE CAN BE DRAWN FROM

09:45AM 11 THAT, BUT THE FACT OF THE MATTER IS THAT HE MISSES THE POINT

09:45AM 12 WHY THE GOVERNMENT POINTED TO THIS DOCUMENT.

09:45AM 13 MR. BALWANI THOUGHT THIS UNALTERED SCHERING-PLOUGH RELATED

09:45AM 14 REPORT WAS IMPORTANT ENOUGH TO SAVE IN HIS FILES.

09:45AM 15 WHY WOULD SOMEONE DO THAT?

09:45AM 16 I UNDERSTAND I'M SPECULATING, BUT SOMEONE WOULD DO THAT

09:45AM 17 BECAUSE HE'S ABOUT TO TAKE CHARGE OF THE RETAIL RELATIONSHIP

09:45AM 18 AND HE MIGHT NEED TO SEND THAT.

09:45AM 19 IMMEDIATELY THEREAFTER, AN EMAIL GOES TO WAL-MART WITH THE

09:46AM 20 UNALTERED REPORTS. THAT RELATIONSHIP GOES NOWHERE.

09:46AM 21 ONE MONTH LATER HE'S ON AN EMAIL TO WALGREENS AND SAFEWAY

09:46AM 22 WITH ALTERED PHARMACEUTICAL REPORTS. THAT RELATIONSHIP GOES

09:46AM 23 SOMEWHERE.

09:46AM 24 AND IN THE YEARS -- AND I UNDERSTAND WE'RE FOCUSED ON THE

09:46AM 25 EARLY TIME PERIOD, BUT I DO THINK IT'S TELLING THAT IN THE

09:46AM 1 YEARS LATER, 2013 TO 2015, MR. BALWANI, WHO HAS THE UNALTERED
09:46AM 2 VERSIONS OF THE REPORT, AT LEAST ONE, SAVED IN HIS FILES, NEVER
09:46AM 3 SENDS AN UNALTERED VERSION TO AN INVESTOR. HE ONLY EVER SENDS
09:46AM 4 ALTERED VERSIONS WITH BOTH LOGOS WITH ENHANCED LANGUAGE.

09:46AM 5 THE COURT: IS THERE -- I'M SORRY TO INTERRUPT YOU.

09:46AM 6 IS THERE EVIDENCE, WILL THERE BE EVIDENCE THAT HE ACTUALLY
09:46AM 7 DID SEND THE ALTERED VERSIONS?

09:46AM 8 MS. VOLKAR: YES, YOUR HONOR, AND I INCLUDED SOME IN
09:46AM 9 MY EXHIBITS. I'M HAPPY TO POINT THE COURT TO THEM.

09:47AM 10 THE FIRST ONE THAT IS COMING TO MIND IS HE SENT ALTERED
09:47AM 11 VERSIONS TO BDT, AND I CAN GRAB THE EXHIBIT NUMBER FOR THAT IF
09:47AM 12 YOU'RE --

09:47AM 13 THE COURT: NO. THAT'S FINE. IT'S IN THE DOCUMENTS
09:47AM 14 THAT YOU FILED?

09:47AM 15 MS. VOLKAR: THAT'S CORRECT, YOUR HONOR.

09:47AM 16 AND HE IS TALKING WITH ELIZABETH HOLMES ABOUT SENDING THE
09:47AM 17 REPORTS TO OTHER INVESTORS AS WELL.

09:47AM 18 BUT THE EXAMPLE WE ATTACHED WHERE IT HAS THE REPORTS WITH
09:47AM 19 IT I BELIEVE IS THE BDT ONE, BUT WE DID INCLUDE EXAMPLES IN OUR
09:47AM 20 FILING.

09:47AM 21 SO WHEN WE GET TO PHILLIPS -- I'M SORRY. I WANT TO SWITCH
09:47AM 22 FROM THOSE ARE THE FACTS. THOSE ARE FACTS THAT KNOW THAT IT'S
09:47AM 23 CIRCUMSTANTIAL EVIDENCE THAT MR. BALWANI SAW UNALTERED REPORTS
09:47AM 24 AND SAW THE PART THAT HE WAS RESPONSIBLE FOR, THE RETAIL
09:47AM 25 RELATIONSHIP WITH WAL-MART, GO NOWHERE. AND THEN HE SAW THE

09:47AM 1 ALTERED REPORTS GO TO WALGREENS AND SAFEWAY.

09:47AM 2 EVEN IF HE DOESN'T HAVE THE SAME LEVEL OF KNOWLEDGE AS

09:47AM 3 MS. HOLMES ABOUT THE PHARMACEUTICAL RELATIONSHIPS, HE'S ON

09:48AM 4 THOSE DOCUMENTS. HE IS SEEING THE OUTCOME.

09:48AM 5 AND LATER ON IN THE FRAUD SCHEME, HE'S ENCOURAGING IT AND

09:48AM 6 HE'S GOING ALONG WITH IT. HE'S ONLY SENDING THE ALTERED

09:48AM 7 VERSIONS OF DOCUMENTS TO INVESTORS.

09:48AM 8 SO I DO THINK THAT A JURY CAN INFER FROM THAT KNOWLEDGE.

09:48AM 9 AND WHEN I GET TO PHILLIPS, I THINK THIS CASE IS

09:48AM 10 INCREDIBLY DISTINGUISHABLE, OR IS VERY FAR AFIELD FROM

09:48AM 11 PHILLIPS. AND OF COURSE YOUR HONOR IS VERY FAMILIAR WITH THAT.

09:48AM 12 IT CAME UP FREQUENTLY IN THE LAST TRIAL.

09:48AM 13 BUT PHILLIPS WAS TALKING ABOUT SOMETHING OF WHICH A

09:48AM 14 DEFENDANT KNOWS NOTHING ABOUT. IN PHILLIPS, THE ALTERED

09:48AM 15 DOCUMENTS WERE NEVER SEEN OR SENT TO CODEFENDANTS AND WERE ONLY

09:48AM 16 SENT TO UNNAMED COCONSPIRATORS, AND THEREFORE, THESE DEFENDANTS

09:48AM 17 WHO NEVER SAW THE DOCUMENTS, THE NINTH CIRCUIT REASONED, CAN'T

09:48AM 18 HAVE THE KNOWLEDGE OF THESE UNNAMED COCONSPIRATORS IMPUTED TO

09:49AM 19 THEM, AND IT WAS SPECIFICALLY CUSTOMER COMPLAINTS ABOUT THE

09:49AM 20 LETTERS.

09:49AM 21 YOUR HONOR USED THAT CASE TO EXCLUDE EVIDENCE OF CUSTOMER

09:49AM 22 COMPLAINTS OF THERANOS THAT WENT TO MR. BALWANI, BUT THAT THERE

09:49AM 23 WAS NO EMAIL SHOWING THAT THEY WENT TO MS. HOLMES.

09:49AM 24 THAT IS AN EXAMPLE OF SOMETHING THAT IS GOING ONLY TO ONE

09:49AM 25 CODEFENDANT OR COCONSPIRATOR OR COSCHEMER, BUT NOT TO ANOTHER.

09:49AM 1 MR. BALWANI IS ON THESE EMAILS, SO HE IS AWARE OF THE KEY
09:49AM 2 FACTS, ALTERED, UNALTERED, AND BOTH OF THOSE DOCUMENTS ARE ON
09:49AM 3 THE GOVERNMENT'S EXHIBIT LIST.

09:49AM 4 SO PHILLIPS IS I JUST THINK IRRELEVANT IN THIS PARTICULAR
09:49AM 5 SCENARIO.

09:49AM 6 ALSO, I BELIEVE MY COLLEAGUE REFERENCED THE FACT THAT
09:49AM 7 MR. BALWANI IS ON ONE OF THE GSK EMAILS.

09:49AM 8 THE DEFENSE HAS NOT POINTED TO ANYTHING, AND THE
09:49AM 9 GOVERNMENT ARGUED THIS IN THE OTHER CASE, THAT SHOWED THE
09:50AM 10 PHARMACEUTICAL COMPANIES GIVING PERMISSION TO SEND THESE
09:50AM 11 REPORTS, ALL OF WHICH WERE GENERATED BY THERANOS. I THINK
09:50AM 12 THAT'S IMPORTANT TO REITERATE. THE PHARMACEUTICAL COMPANIES
09:50AM 13 NEVER GAVE PERMISSION TO SEND THESE REPORTS TO ANYONE OUTSIDE
09:50AM 14 OF THE PHARMACEUTICAL COMPANY.

09:50AM 15 THEY ALL HAD CONTRACTS, IT CAME OUT THROUGH
09:50AM 16 CROSS-EXAMINATION OF MS. HOLMES, THEY ALL HAD CONTRACTS THAT
09:50AM 17 SAID SPECIFICALLY THESE REPORTS AND THIS DATA WAS NOT ALLOWED
09:50AM 18 TO BE SHARED, BUT MS. HOLMES AND MR. BALWANI HAVE NEVER SHOWN
09:50AM 19 THAT THEY ACTUALLY GOT THAT PERMISSION IN ORDER TO SHARE THESE.

09:50AM 20 AND MR. BALWANI IS ON SEVERAL EMAILS WHERE THEY SEND THESE
09:50AM 21 REPORTS FREELY AND WITH THE ADDED LOGOS. SO THAT'S ANOTHER
09:50AM 22 ASPECT OF EVEN THOUGH HE WAS ON AN EMAIL TO GSK WITH THIS
09:50AM 23 REPORT, IT'S STILL NOT PROVIDING THAT LINK THAT THERE WAS
09:50AM 24 PERMISSION TO SEND IT TO OTHER INVESTORS, WHICH HE HIMSELF
09:50AM 25 LATER DID.

09:50AM 1 SO NOW WE GET TO VICARIOUS LIABILITY, AND I WANT TO BE
09:50AM 2 EXTRA CLEAR HERE BECAUSE THE GOVERNMENT'S OPPOSITION SPENDS A
09:51AM 3 DECENT OF TIME ON THIS AND IT IS IMPORTANT.
09:51AM 4 THERE IS EVIDENCE OF MR. BALWANI'S ACTUAL KNOWLEDGE. THAT
09:51AM 5 MEANS THIS ISN'T A PHILLIPS SCENARIO. THIS EVIDENCE IS
09:51AM 6 ABSOLUTELY RELEVANT.
09:51AM 7 AND IN THE HOLMES CASE, THE GOVERNMENT DID NOT KNOW THAT
09:51AM 8 MS. HOLMES WAS GOING TO TESTIFY.
09:51AM 9 AND TO TAKE MY COLLEAGUE'S ARGUMENT TO ITS FULLEST EXTENT,
09:51AM 10 HE IS SAYING, I BELIEVE INCORRECTLY, THAT THE GOVERNMENT
09:51AM 11 SHOULDN'T HAVE BEEN ABLE TO ADMIT THIS EVIDENCE IN THE PAST
09:51AM 12 CASE IN ITS CASE-IN-CHIEF BECAUSE IT DIDN'T KNOW WHO ACTUALLY
09:51AM 13 ALTERED THE DOCUMENTS, AND ONLY WHEN MS. HOLMES TESTIFIED THAT
09:51AM 14 SHE ALTERED THE DOCUMENTS DID THIS EVIDENCE BECOME RELEVANT AND
09:51AM 15 ADMISSIBLE. AND THAT'S JUST WRONG, YOUR HONOR.
09:51AM 16 WE'RE SEEKING TO ADMIT THE SAME EVIDENCE IN THIS CASE.
09:51AM 17 IT'S NOT LIKE THIS IS SOMETHING THAT HAPPENED IN 2008 BEFORE
09:51AM 18 MR. BALWANI JOINED THE COMPANY. THIS HAPPENED IN 2010. HE'S
09:51AM 19 ON THE KEY EMAILS. HE'S PART OF THE COMPANY. HE'S
09:52AM 20 ROMANTICALLY INVOLVED WITH HER. THERE ARE A LOT OF DIFFERENT
09:52AM 21 ASPECTS. HE ENDS UP SENDING THESE SAME ALTERED REPORTS LATER,
09:52AM 22 EVEN THOUGH HE HAS UNALTERED VERSIONS SAVED IN HIS COMPUTER
09:52AM 23 FILES.
09:52AM 24 AS I PROMISED, I WANT TO TURN QUICKLY TO VICARIOUS
09:52AM 25 LIABILITY. MY COLLEAGUE TAKES ISSUE WITH THE CONCEPT OF

09:52AM 1 VICTARIOUS LIABILITY, BUT WE ARE IN THE NINTH CIRCUIT AND THAT
09:52AM 2 STILL IS THE CONTROLLING LAW.

09:52AM 3 ONE IS RESPONSIBLE FOR THE ACTS OF A COSCHEMER OR
09:52AM 4 COCONSPIRATOR THAT ARE DURING THE CONSPIRACY AND IN FURTHERANCE
09:52AM 5 OF THE CONSPIRACY, AND THIS IS EXACTLY WHAT THE GOVERNMENT
09:52AM 6 ALLEGES IN THE THIRD SUPERSEDING INDICTMENT.

09:52AM 7 THE CONSPIRACY AND SCHEME TO DEFRAUD INVESTORS BEGAN IN
09:52AM 8 2010 WITH WALGREENS, AND ONE OF THE LIES THAT WALGREENS WAS
09:52AM 9 TOLD WAS THE FACT THAT PHARMACEUTICAL COMPANIES HAD VALIDATED
09:52AM 10 THERANOS, AND ONE OF THE VEHICLES FOR SHOWING AND DEMONSTRATING
09:52AM 11 THAT LIE WAS THESE ALTERED PHARMACEUTICAL REPORTS.

09:52AM 12 THIS IS CORELY AND SQUARELY WITHIN THE CONSPIRACY AND THE
09:53AM 13 SCHEME TO DEFRAUD THAT THE GOVERNMENT HAS ALLEGED AND PROVED IN
09:53AM 14 THE LAST TRIAL AND BELIEVES IT WILL MEET ITS BURDEN TO DO SO
09:53AM 15 HERE.

09:53AM 16 SO WITH THAT, IT BRINGS ME TO RULE 403, AND I DON'T THINK
09:53AM 17 I NEED TO SAY MUCH MORE THERE BECAUSE ONCE, ONCE THE COURT
09:53AM 18 REALIZES, AS THE GOVERNMENT SUBMITS, THAT THE EVIDENCE IS
09:53AM 19 RELEVANT, IT'S NOT HEARSAY, IT'S VERY PROBATIVE, AND IT'S NOT
09:53AM 20 PREJUDICIAL, THE ONE POINT THAT MY COLLEAGUE ADDED IN ADDITION
09:53AM 21 IS THE -- THAT IT WOULD MISLEAD OR CONFUSE THE JURY.

09:53AM 22 AND IT DIDN'T MISLEAD OR CONFUSE THE LAST JURY, AND THEY
09:53AM 23 WILL BE ABLE, THROUGH CROSS-EXAMINATION AND CLOSING ARGUMENT,
09:53AM 24 TO POINT OUT TO THE JURY THAT HE WASN'T -- THAT MR. BALWANI WAS
09:53AM 25 NOT INVOLVED WITH THE PHARMACEUTICAL RELATIONSHIPS.

09:53AM 1 THE GOVERNMENT INTENDS TO CALL PHARMACEUTICAL WITNESSES.

09:53AM 2 THEY'LL BE ABLE TO ASK THEM, DID YOU EVER -- DO YOU EVEN KNOW

09:53AM 3 WHO MR. BALWANI IS? I DON'T MEAN TO DO MY COLLEAGUE'S JOB FOR

09:54AM 4 HIM OR PUT WORDS IN HIS MOUTH, BUT THAT IS STILL OPEN AND

09:54AM 5 AVAILABLE TO THEM. THIS EVIDENCE CAN STILL BE TESTED THROUGH

09:54AM 6 THE TRIAL PROCESS, AND RULE 403 IS NOT THE BASIS TO EXCLUDE IT.

09:54AM 7 AND THEN I SAID THAT WAS THE LAST POINT, BUT THE VERY LAST

09:54AM 8 POINT IS, OF COURSE, THIS EVIDENCE IS IMPORTANT FOR FALSITY

09:54AM 9 BECAUSE IT IS ONE OF THE WAYS THAT NOT JUST WALGREENS, BUT

09:54AM 10 LATER INVESTORS -- YOUR HONOR HEARD MR. MOSLEY, LISA PETERSON,

09:54AM 11 SEVERAL OF THE INVESTORS TALKED ABOUT HOW IMPORTANT THESE

09:54AM 12 REPORTS WERE TO THEM AND SEEING THE LOGO MADE THEM THINK THAT

09:54AM 13 THESE WERE AUTHORED BY THESE PHARMACEUTICAL COMPANIES.

09:54AM 14 MR. BALWANI SAW A VERSION AT LEAST OF THE SCHERING-PLOUGH

09:54AM 15 DOCUMENT WITHOUT THAT LOGO. HE DID HAVE THE KNOWLEDGE THAT

09:54AM 16 THOSE INVESTORS NEVER GOT THE BENEFIT OF, THAT A VERSION

09:54AM 17 EXISTED WITHOUT THE LOGO, AND THAT'S WHY THE EVIDENCE SHOULD BE

09:54AM 18 ADMISSIBLE FOR FALSITY AS WELL, AND HE DOES KNOW ABOUT IT

09:54AM 19 DIRECTLY.

09:54AM 20 THANK YOU.

09:54AM 21 THE COURT: THANK YOU.

09:54AM 22 ARE YOU SEEKING THEN -- IS THE GOVERNMENT GOING TO SEEK,

09:54AM 23 TO THE EXTENT THAT YOU CAN TELL US, TO ADMIT ALL OF THE

09:55AM 24 DOCUMENTS, THE ALTERED DOCUMENTS? I THINK THERE WERE TWO OF

09:55AM 25 THEM, WERE THERE?

09:55AM 1 MS. VOLKAR: I BELIEVE THERE WERE THREE, YOUR HONOR,

09:55AM 2 BUT WE DIDN'T -- I DON'T THINK -- THE THIRD ONE DID NOT COME

09:55AM 3 INTO PLAY UNTIL MS. HOLMES WAS TESTIFYING.

09:55AM 4 SO I BELIEVE THE GOVERNMENT WOULD BE SEEKING -- WE DID

09:55AM 5 COMMIT TO NOT REFERENCING IT IN THE OPENING STATEMENT, BUT I DO

09:55AM 6 BELIEVE WE WOULD BE SEEKING TO ADMIT THE TWO ALTERED REPORTS WE

09:55AM 7 DID LAST TIME, WHICH WAS PFIZER AND SCHERING-PLOUGH, AND IT'S

09:55AM 8 RELATED TO THOSE TWO PHARMACEUTICAL COMPANIES.

09:55AM 9 THE COURT: I SEE. OKAY.

09:55AM 10 SO YOUR COLLEAGUE OPPOSITE'S POSITION IS, WELL -- AND HE

09:55AM 11 MAY SAY, AND I'M GOING TO TURN TO HIM IN A MOMENT -- WELL,

09:55AM 12 THAT'S ALL FINE AND GOOD, BUT IT STILL CAUSES EXTREME

09:55AM 13 SPECULATION. IT WOULD STILL CAUSE EXTREME SPECULATION BY THE

09:55AM 14 JURY. AND THAT'S SOMETHING THAT I THINK HE SAID WHEN HE TOLD

09:55AM 15 US IT WOULD BE INHERENTLY UNFAIR TO HIS CLIENT.

09:56AM 16 WHAT IS YOUR COMMENT TO THAT?

09:56AM 17 MS. VOLKAR: THANK YOU, YOUR HONOR.

09:56AM 18 I THINK IT'S NO MORE SPECULATION THAN THE JURY WAS

09:56AM 19 PERMITTED IN THE LAST CASE.

09:56AM 20 AND THE ONE NEW FACT, AS MY COLLEAGUE PUTS IT, IS

09:56AM 21 MS. HOLMES'S TESTIMONY.

09:56AM 22 BUT CONTRARY TO WHAT HE SAID, THE GOVERNMENT IS NOT, AND

09:56AM 23 THE COURT IS NOT, BOUND TO BELIEVE THE TRUTH OF MS. HOLMES'S

09:56AM 24 TESTIMONY.

09:56AM 25 IN FACT, THE JURY IS INSTRUCTED YOU CAN BELIEVE ALL, PART,

09:56AM 1 OR NONE OF A PERSON'S TESTIMONY.

09:56AM 2 AND FROM THE SAME -- I'M ASSUMING MY COLLEAGUE IS

09:56AM 3 REFERRING TO THE NEWS REPORT -- FROM THE SAME REPORTS THAT

09:56AM 4 JURORS GAVE TO NEWS AND MEDIA OUTLETS, THEY RANKED MS. HOLMES'S

09:56AM 5 CREDIBILITY VERY LOW.

09:56AM 6 I DIGRESS A LITTLE BIT HERE, BUT WHAT I'M TRYING TO SAY IS

09:56AM 7 EVEN THOUGH SHE SAID, I DID IT, AND DIDN'T SAY, WE DID IT, OR I

09:56AM 8 DID IT IN CONSULTATION WITH MR. BALWANI, THE GOVERNMENT IS NOT

09:56AM 9 BOUND TO THAT VERSION.

09:56AM 10 AND THE QUESTIONS WEREN'T ASKED WHETHER SHE DISCUSSED THIS

09:56AM 11 DECISION WITH MR. BALWANI OR WHETHER SHE WAS DIRECTED TO DO SO.

09:57AM 12 WE ALSO KNOW THAT SHE TESTIFIED EVERYTHING SHE DID AT THE

09:57AM 13 COMPANY WAS INFLUENCED BY HIM.

09:57AM 14 SO WHAT I'M SAYING IS THAT MY COLLEAGUE WANTS TO PICK AND

09:57AM 15 CHOOSE CERTAIN PORTIONS OF HER TESTIMONY, BUT WE ARE ALSO --

09:57AM 16 BUT WE, THE GOVERNMENT, ARE ALSO NOT BOUND TO TAKE THAT AS THE

09:57AM 17 GOSPEL TRUTH.

09:57AM 18 AND ALSO, EVEN IF WE WERE TO ACCEPT THE TRUTH OF HER

09:57AM 19 TESTIMONY, IT DOESN'T, IT DOESN'T ELIMINATE ANY POSSIBLE

09:57AM 20 JOINING OR -- PARDON ME, YOUR HONOR. IT DOESN'T EXCUSE ANY

09:57AM 21 POSSIBLE INVOLVEMENT OF MR. BALWANI IN THESE ACTS.

09:57AM 22 AND THESE ACTS DID HAPPEN, AGAIN, IF WE WERE TO BELIEVE

09:57AM 23 MS. HOLMES'S TESTIMONY, IN APRIL 2010 BETWEEN THAT WAL-MART

09:57AM 24 EMAIL IN MARCH 2010 AND THE WALGREENS AND SAFEWAY EMAIL IN

09:57AM 25 APRIL OF 2010. MR. BALWANI IS THERE, HE'S ON THESE EMAILS,

09:57AM 1 HE'S ROMANTICALLY INVOLVED WITH HER, HE'S GOT MONEY ON THE
09:57AM 2 LINE, AND HE IS COO OF THERANOS, A COMPANY THAT HE HAS JOINED
09:58AM 3 AND COMMITTED TO MAKING THE BEST COMPANY HE CAN, AND THAT'S
09:58AM 4 MOTIVE, YOUR HONOR.

09:58AM 5 SO I DO THINK THAT IT'S NOT UNDUE SPECULATION TO GIVE
09:58AM 6 THESE FACTS TO THE JURY AND SAY THAT BASED ON THESE FACTS HE
09:58AM 7 PROBABLY DID KNOW.

09:58AM 8 WE HEARD SEVERAL POTENTIAL JURORS EARLIER THIS WEEK TALK
09:58AM 9 ABOUT HOW CLOSELY COO'S AND CEO'S OF STARTUPS WORK TOGETHER,
09:58AM 10 AND ESPECIALLY WHEN THEY'RE ROMANTICALLY INVOLVED.

09:58AM 11 AND I ONLY SAY THAT TO SAY THAT WE, THE GOVERNMENT,
09:58AM 12 CONTINUE TO BELIEVE THAT THESE TWO WORKED TOGETHER ON
09:58AM 13 EVERYTHING. AND I THINK THERE ARE SEVERAL WITNESSES WHO HAVE
09:58AM 14 TALKED AND SPOKEN TO THAT EFFECT AND TESTIFIED TO THAT EFFECT,
09:58AM 15 THAT MS. HOLMES AND MR. BALWANI DISCUSSED EVERYTHING.

09:58AM 16 SO I DON'T THINK THAT IT'S UNDUE SPECULATION TO ASK THE
09:58AM 17 JURY THAT, EVEN IF HE WASN'T INVOLVED WITH THE PHARMACEUTICAL
09:58AM 18 RELATIONSHIPS, THAT HE MAY HAVE LEARNED FROM MS. HOLMES OR
09:58AM 19 AGAIN, AT THE VERY LEAST, HE SAW UNALTERED VERSIONS, HE SAW
09:58AM 20 ALTERED VERSIONS.

09:58AM 21 WHICH DID HE CHOOSE TO USE WHEN HE TRIED TO GET HUNDREDS
09:59AM 22 OF MILLIONS OF DOLLARS? HE USED THE ALTERED VERSIONS.

09:59AM 23 THE COURT: OKAY. I'M GOING TO ASK YOUR COLLEAGUE
09:59AM 24 OPPOSITE IF THAT, WHAT YOU JUST SAID, WOULD BE ADMISSIBLE.

09:59AM 25 BUT I'M ALSO CURIOUS, IS THERE ANY LIMITATION THAT YOU

09:59AM 1 BELIEVE THE COURT SHOULD PUT ON THE ADMISSION OF ANY OF THIS
09:59AM 2 EVIDENCE?

09:59AM 3 YOU HEARD US TALK IN THE HOLMES TRIAL MANY TIMES, THIS
09:59AM 4 ONLY GOES TO KNOWLEDGE, THIS ONLY GOES TO INTENT, THIS ONLY
09:59AM 5 GOES TOWARDS WHATEVER IT IS.

09:59AM 6 ARE THERE LIMITING INSTRUCTIONS THAT YOU THINK WOULD
09:59AM 7 APPLY?

09:59AM 8 MS. VOLKAR: THE GOVERNMENT'S POSITION IS NO.

09:59AM 9 BUT OF COURSE IT DOES DEPEND ON YOUR HONOR'S RULING, AND
09:59AM 10 THAT'S BECAUSE WE DO THING THAT IT GOES TO BOTH KNOWLEDGE AND
09:59AM 11 FALSITY.

09:59AM 12 IF YOUR HONOR BUYS ANY PART OF THE DEFENSE'S ARGUMENT --
09:59AM 13 I'M SORRY TO SAY IT THAT WAY, BUT IF YOUR HONOR AGREES WITH THE
09:59AM 14 DEFENSE IN THAT WAY THAT, FOR EXAMPLE, PHILLIPS WORKS, OR
09:59AM 15 DISAGREES WITH THE CONCEPT -- I HATE TO SAY THIS BUT DISAGREES
10:00AM 16 WITH THE CONCEPT OF VICARIOUS LIABILITY, THEN I GUESS IT COULD
10:00AM 17 BE A LIMITING INSTRUCTION THAT THIS EVIDENCE IS ONLY FOR THE
10:00AM 18 PURPOSE OF FALSITY.

10:00AM 19 BUT THERE'S STILL, AS I SEE IT, AS THE GOVERNMENT SEES IT,
10:00AM 20 I HAVE NOT HEARD ANY REASON TO BAR THIS EVIDENCE ENTIRELY,
10:00AM 21 AGAIN, EXCEPT FOR RULE 403.

10:00AM 22 BUT I THINK WE ALL AGREE THIS IS HIGHLY RELEVANT EVIDENCE,
10:00AM 23 AND, AGAIN, I DISAGREE WITH THE PREMISE THAT MR. BALWANI HAD NO
10:00AM 24 POSSIBLE KNOWLEDGE OF THE ALTERATION.

10:00AM 25 THERE MAY BE A LIMITING INSTRUCTION THAT MR. BALWANI WAS

10:00AM 1 NOT AT THE COMPANY DURING THE TIME PERIOD IT WORKED WITH THE
10:00AM 2 PHARMACEUTICAL COMPANIES. LIKE, I CAN SEE SOME LIMITATION OF
10:00AM 3 CONDUCT BEFORE 2009 OR REALLY BEFORE 2010 WHEN THE INDICTMENT
10:00AM 4 ALLEGES THE CONSPIRACY BEGAN. THERE IS A WORLD IN WHICH
10:00AM 5 PRECONSPIRACY CONDUCT SHOULD NOT BE CONSIDERED AGAINST HIM, AND
10:00AM 6 THAT'S PARTICULARLY IMPORTANT IF WE'RE IN THE WORLD OF
10:01AM 7 VICARIOUS LIABILITY.

10:01AM 8 THANK YOU.

10:01AM 9 THE COURT: THANK YOU.

10:01AM 10 MR. BRECHER: THANK YOU. I APPRECIATE THE
10:01AM 11 OPPORTUNITY TO RESPOND.

10:01AM 12 FIRST, I DID HEAR MY COLLEAGUE SAY, TWO-THIRDS OF THE WAY
10:01AM 13 THROUGH HER REMARKS, ACKNOWLEDGE THAT MR. BALWANI ONLY EVER
10:01AM 14 RECEIVED WHAT WE'LL CALL THE "UNALTERED" VERSION OF THE
10:01AM 15 SCHERING-PLough REPORT.

10:01AM 16 BUT I COUNTED SIX TIMES IN WHICH THE REPRESENTATION WAS
10:01AM 17 MADE THAT HE HAD UNALTERED VERSIONS, HE HAD ALTERED VERSIONS.

10:01AM 18 AS TO PFIZER AND GSK, SIMPLY NOT TRUE. MR. BALWANI NEVER
10:01AM 19 SAW, NEVER POSSESSED THE UNALTERED VERSIONS, AND THE GOVERNMENT
10:01AM 20 HAS NO EVIDENCE OF ANY KIND TO THE CONTRARY. SO LET'S BE VERY
10:01AM 21 CLEAR ABOUT THAT.

10:01AM 22 SECOND, I HOPE THAT I DID NOT SUGGEST THAT I DISAGREED
10:01AM 23 WITH THE CONCEPT OF VICARIOUS LIABILITY. I BELIEVE WHAT OUR
10:01AM 24 PAPERS AND MY ARGUMENT TODAY SAID IS THAT THE GOVERNMENT IS
10:01AM 25 REQUIRED TO MAKE A SHOWING BEFORE IT CAN INTRODUCE THAT

10:01AM 1 EVIDENCE, AND IT IS. AND THAT SHOWING HAS TO BE CONSIDERED ON
10:01AM 2 A PREPONDERANCE STANDARD. THEY HAVE TO MEET THAT BURDEN, AND I
10:02AM 3 DON'T THINK THAT THEY CAN.

10:02AM 4 BUT LET'S SHIFT GEARS BACK TO THE ISSUE OF MR. BALWANI'S
10:02AM 5 PERSONAL KNOWLEDGE.

10:02AM 6 IF MR. BALWANI ONLY EVER HAS THE ALTERED PFIZER AND GSK
10:02AM 7 REPORTS, THEN THOSE ARE GOING TO BE THE ONLY REPORTS THAT HE'S
10:02AM 8 EVER GOING TO SEND TO INVESTORS.

10:02AM 9 AND AS FOR SCHERING-PLOUGH, I DON'T BELIEVE, AND I DON'T
10:02AM 10 BELIEVE THE GOVERNMENT SERIOUSLY BELIEVES, THAT RECEIVING THAT
10:02AM 11 IN MARCH -- OR MARCH 19TH, 2010, AND THEN SEEING -- AGAIN,
10:02AM 12 BEING COPIED ON AN EMAIL IN APRIL, A MONTH LATER, MEANS THAT HE
10:02AM 13 HAD ACTUAL KNOWLEDGE OR EVEN CONSTRUCTIVE KNOWLEDGE.

10:02AM 14 AND I THINK ONE OF THE REASONS THAT GOES TO THAT IS THAT
10:02AM 15 THERE WAS NO RESPONSE TO THE GOVERNMENT'S OWN, THE GOVERNMENT'S
10:02AM 16 OWN ILLUSTRATIONS IN MR. SCHENK'S CLOSING OR IN ITS OWN
10:02AM 17 BRIEFING.

10:02AM 18 I'M NOT ACCUSING THE GOVERNMENT OF ANYTHING, YOUR HONOR,
10:02AM 19 BUT DID THE GOVERNMENT TRY TO MISLEAD THIS COURT ABOUT THE
10:02AM 20 METADATA ISSUE, ABOUT THE DATE? OF COURSE NOT. IT'S A SIMPLE
10:03AM 21 MISTAKE. BUT BEAR IN MIND THE CONTEXT OF THAT SIMPLE MISTAKE.

10:03AM 22 THEY LOOKED AT THIS TINY STRING OF TEXTS. THEY RELIED ON
10:03AM 23 IT, THEY EXAMINED IT CLOSELY, AND THEY WROTE A BRIEF THAT THEY
10:03AM 24 SUBMITTED TO YOU, AND THEY MADE SEVERAL ASSERTIONS OF FACT THAT
10:03AM 25 TURNED OUT TO BE UNTRUE.

10:03AM 1 AND, YET, THAT'S PERFECTLY INNOCENT?

10:03AM 2 BUT MR. BALWANI SHOULD BE EXPECTED, BY ANY REASONABLE

10:03AM 3 MIND, TO HAVE PUT THE MISSING LOGO TOGETHER, TO HAVE DRAWN SOME

10:03AM 4 INFERENCE FROM THAT? I THINK THAT THAT'S JUST ABSURD,

10:03AM 5 YOUR HONOR.

10:03AM 6 AND I WANT TO MOVE ON.

10:03AM 7 THE REST OF THE EVIDENCE IS ABOUT EVENTS IN 2013, 2014,

10:03AM 8 2015. ALL I HEAR IS THAT THEY'RE TEXTING EXTENSIVELY ABOUT THE

10:03AM 9 COMPANY.

10:03AM 10 WELL, YEAH, IT'S THE CEO AND THE COO.

10:03AM 11 BUT AS YOUR HONOR'S OWN JURY INSTRUCTION, I THINK IT'S

10:03AM 12 FINAL INSTRUCTION 16 IN THE HOLMES CASE POINTS OUT, THAT'S NOT

10:03AM 13 ENOUGH. THAT'S NOT ENOUGH FOR THIS COURT TO MAKE ITS THRESHOLD

10:03AM 14 SHOWING.

10:03AM 15 OH, THE ISSUE OF WHAT COULD OR COULD NOT COME INTO THE

10:04AM 16 HOLMES TRIAL, I THINK IT'S, FRANKLY, A STRANGE ARGUMENT BECAUSE

10:04AM 17 AS BOTH SIDES REPEATEDLY ACKNOWLEDGED IN THEIR BRIEFING, WHAT

10:04AM 18 HAPPENED IN THE HOLMES TRIAL DOESN'T BIND US HERE.

10:04AM 19 BUT HERE IT'S NOT SOME ACADEMIC POINT ABOUT THE LAW OF THE

10:04AM 20 CASE WHERE YOUR HONOR HAS PASSED ON THE QUESTION AND WE'RE

10:04AM 21 ASKING YOU TO PLEASE RECONSIDER IT.

10:04AM 22 MS. HOLMES NEVER MOVED FOR THIS RELIEF, AND SO THE COURT

10:04AM 23 IS WRITING ON A COMPLETE BLANK SLATE.

10:04AM 24 THE OTHER ISSUE, YOUR HONOR, IS OF COURSE THE GOVERNMENT

10:04AM 25 KNEW GOING INTO THE HOLMES TRIAL THAT SHE WAS INTIMATELY

10:04AM 1 INVOLVED AND MANAGED THE PHARMACEUTICAL RELATIONSHIPS. INDEED,

10:04AM 2 MR. BALWANI WASN'T EVEN AT THE COMPANY WHILE WHEN THESE EVENTS

10:04AM 3 WERE GOING ON. IT'S A VERY DIFFERENT CONTEXT HERE.

10:04AM 4 AND AS FOR THE NOTION -- SO I THINK WHAT THEY WERE

10:04AM 5 PLANNING TO DO IN THE HOLMES TRIAL WAS PERFECTLY FAIR, AND I

10:04AM 6 THINK I SAID THAT IN MY OPENING REMARKS TODAY.

10:04AM 7 BUT THINGS CHANGE. IF I'M A PROSECUTOR AND I DON'T HAVE

10:04AM 8 ANY EXONERATORY EVIDENCE IN MY POSSESSION, THEN I'VE DISCHARGED

10:05AM 9 MY BRADY OBLIGATIONS. I DON'T HAVE ANYTHING TO DISCLOSE.

10:05AM 10 BUT IF LATER I DO, WELL, NOW I HAVE SOMETHING TO DISCLOSE.

10:05AM 11 NOW WE KNOW A NEW FACT, AND WITHOUT KNOWLEDGE OF THAT NEW FACT,

10:05AM 12 WHICH THE JURY CANNOT HEAR WITHOUT SOME SACRIFICE OF

10:05AM 13 MR. BALWANI'S CONSTITUTIONAL RIGHTS, IT RISKS SEVERE AND

10:05AM 14 UNWARRANTED PREJUDICE, BECAUSE THE ONLY NATURAL CONCLUSION THAT

10:05AM 15 THEY'RE GOING TO DRAW IS LOOK AT WHO IS ON THE DOCS. IT'S JUST

10:05AM 16 HIM.

10:05AM 17 MS. HOLMES IS NOT HERE, AND BARRING SOMETHING SURPRISING,

10:05AM 18 I DON'T THINK WE'RE GOING TO HEAR FROM HER, AND I DON'T THINK

10:05AM 19 MR. BALWANI IS GOING TO HAVE A CHANCE TO QUESTION HER TO ASK

10:05AM 20 THAT FOLLOW-UP QUESTION, AND IT'S PRECISELY THAT ABSENCE OF

10:05AM 21 OPPORTUNITY THAT MAKES THIS ALL SO UNFAIR.

10:05AM 22 AGAIN, YOUR HONOR, I'M HAPPY TO ANSWER ANY OF THE COURT'S

10:05AM 23 QUESTIONS, BUT I THINK THAT I'LL LEAVE IT THERE AND ON OUR

10:05AM 24 PAPERS, UNLESS YOUR HONOR HAS QUESTIONS.

10:05AM 25 THE COURT: YOU HEARD ME ASK MS. VOLKAR ABOUT

10:05AM 1 LIMITING INSTRUCTIONS. PERHAPS THERE WAS SOME CONVERSATION
10:05AM 2 ABOUT THAT.

10:05AM 3 IS THERE ANY LIMITING INSTRUCTION OR ADMONITION TO ANY
10:06AM 4 ADMONITION OF SOME OF THIS EVIDENCE THAT YOU THINK WOULD ASSIST
10:06AM 5 THE JURY IN NOT TAKING AN UNTOWARD OR INAPPROPRIATE REACTION TO
10:06AM 6 THE EVIDENCE?

10:06AM 7 MR. BRECHER: IT'S AN INTERESTING QUESTION,
10:06AM 8 YOUR HONOR.

10:06AM 9 THE COURT: THANK YOU.

10:06AM 10 MR. BRECHER: I'M TROUBLED TO THINK OF ONE OFFHAND
10:06AM 11 THAT WOULD CURE THE ISSUE.

10:06AM 12 I THINK PART OF THE PROBLEM IS THAT THE PARTIES ARE NOT
10:06AM 13 GOING TO COME TO A PLACE OF ALIGNMENT, RIGHT?

10:06AM 14 WE MIGHT IMAGINE AN INSTRUCTION THAT SAYS SOMETHING LIKE,
10:06AM 15 THIS EVIDENCE IS ONLY ADMISSIBLE FOR FALSITY. YOU CAN CONSIDER
10:06AM 16 WHETHER IN FACT THE PHARMACEUTICAL COMPANIES AUTHORIZED THIS,
10:06AM 17 BUT YOU CAN'T CONSIDER IT FOR MR. BALWANI'S INTENT.

10:06AM 18 I DON'T THINK THE GOVERNMENT WOULD LIKE THAT VERY MUCH,
10:06AM 19 AND FRANKLY, I DON'T THINK IT WOULD SOLVE -- WHILE IT WOULD BE
10:06AM 20 SOMEWHAT HELPFUL, I DON'T THINK IT WOULD SOLVE OUR CONCERNs
10:06AM 21 BECAUSE, AGAIN, THE NARROW ISSUE THAT WE'RE FOCUSSSED ON, AND IT
10:06AM 22 REALLY IS THAT TIGHT ISSUE, IS THE ACT OF ALTERING, DOCTORING,
10:07AM 23 ENHANCING, WHATEVER YOUR HONOR 'S PREFERRED TERM, IN APRIL OF
10:07AM 24 2010.

10:07AM 25 AND SHOWING THAT THERE IS A CONSPIRACY OR COULD BE A

10:07AM 1 CONSPIRACY OR MAYBE WAS A CONSPIRACY OR A SCHEME IN 2013 OR
10:07AM 2 2014, THAT CAN'T GO BACK IN TIME TO 2010 BECAUSE -- AND THE
10:07AM 3 GOVERNMENT ABSOLUTELY RECITES THIS ACCURATELY IN THEIR BRIEF,
10:07AM 4 THEY JUST DON'T APPLY IT ACCURATELY -- ACTS OF COSCHEMEERS OR
10:07AM 5 COCONSPIRATORS HAVE TO BE DONE NOT ONLY IN FURTHERANCE OF THE
10:07AM 6 SCHEME OR CONSPIRACY, BUT DURING THE COURSE OF THE SCHEME OR
10:07AM 7 CONSPIRACY.

10:07AM 8 UNDER THE GOVERNMENT'S THEORY, THAT DURATIONAL
10:07AM 9 REQUIREMENT, THAT TEMPORAL RESTRICTION WOULD BE COMPLETELY
10:07AM 10 MEANINGLESS, AND NOW YOU'RE GOING TO HAVE A RANGE OF TRIALS IN
10:07AM 11 WHICH THE GOVERNMENT IS GOING TO TALK ABOUT ALLEGED MISCONDUCT
10:07AM 12 OF ABSENT PARTIES AND ABSENT WITNESSES AND SAYING, YEAH, THE
10:07AM 13 DEFENDANT IS PROBABLY RESPONSIBLE FOR IT.

10:07AM 14 I DON'T THINK THAT THAT CAN STAND, YOUR HONOR. I THINK
10:07AM 15 THAT OUR NARROW RESTRICTION IS NECESSARY HERE.

10:07AM 16 THE COURT: SO LET ME JUST REVIEW. SO YOU'VE TOLD
10:08AM 17 ME THAT THE ALTERED DOCUMENTS MIGHT BE ADMISSIBLE IN THE CASE.
10:08AM 18 YOU SAID THAT YOU COULD SEE THAT THAT WOULD BE IMPORTANT TO THE
10:08AM 19 GOVERNMENT AND THEY WOULD BE ADMISSIBLE TO SHOW THE JURY,
10:08AM 20 HERE'S WHAT INVESTORS RECEIVED, OR THE INVESTORS MAY TESTIFY,
10:08AM 21 YES, THIS IS WHAT I RECEIVED.

10:08AM 22 YOU HAVE NO QUARREL WITH THAT?

10:08AM 23 MR. BRECHER: NONE WHATSOEVER, YOUR HONOR.
10:08AM 24 I THINK AS LONG AS THERE'S NOTHING FROM WHICH THE JURY
10:08AM 25 COULD INAPPROPRIATELY INFER THAT THERE WAS SOME ALTERATION OR

10:08AM 1 CHANGE, AGAIN, THE SORT OF SOLUTION THAT I'M THINKING OF IN MY
10:08AM 2 HEAD IS SOME KIND OF REDACTION EXERCISE, BUT I'M NOT WEDDED TO
10:08AM 3 THAT.

10:08AM 4 THE COURT: PARDON ME, I'M JUST NOT FOLLOWING THAT.

10:08AM 5 MR. BRECHER: OH.

10:08AM 6 THE COURT: SO THE JURY COULD RECEIVE THE UNALTERED
10:08AM 7 AND THE ALTERED? DO YOU HAVE ANY PROBLEM WITH THAT?

10:08AM 8 MR. BRECHER: OH -- I DO.

10:08AM 9 I WANT TO MAKE SURE I'M TRACKING THE COURT'S QUESTION, SO
10:08AM 10 MAYBE I SHOULD BACK UP.

10:08AM 11 THE COURT: SURE.

10:08AM 12 MR. BRECHER: THE WITNESSES LIKE MR. WEBER AND
10:09AM 13 MS. CULLEN, THEIR ROLES, THEIR PERSONAL KNOWLEDGE, AND IT
10:09AM 14 ENDS -- IN MR. WEBER'S CASE I THINK IT IS LATE 2008 TO EARLY
10:09AM 15 JANUARY OF 2009, AND IN MS. CULLEN'S CASE IT'S LATE 2009. SO
10:09AM 16 THEY'RE NOT GOING FORWARD IN TIME.

10:09AM 17 CERTAINLY THE GOVERNMENT CAN SHOW THE WITNESSES THE
10:09AM 18 REPORTS THAT WERE PREPARED BY THERANOS ABOUT THOSE
10:09AM 19 PARTNERSHIPS.

10:09AM 20 THE COURT: AND THEY WOULD SAY, YES, THIS IS -- THEY
10:09AM 21 TIME STAMPED THOSE REPORTS.

10:09AM 22 MR. BRECHER: AND SAY, NO, WE DIDN'T COMPREHENSIVELY
10:09AM 23 VALIDATE; NO, WE NEVER COMMUNICATED THAT TO THE COMPANY.

10:09AM 24 PERFECTLY FINE. I HAVE NO OBJECTION TO IT WHATSOEVER.

10:09AM 25 SECOND, IN THE LATER PERIOD, THAT 2013/2014 PERIOD WHERE

10:09AM 1 THE ENHANCED VERSIONS OF THE REPORTS ARE BEING SENT TO
10:09AM 2 INVESTORS, THAT INVESTORS RECEIVE THESE REPORTS AND WHETHER
10:09AM 3 THAT -- THOSE RELATIONSHIPS AND THOSE REPRESENTATIONS WERE
10:09AM 4 MATERIAL, TOTALLY FAIR GAME.
10:09AM 5 WHETHER THOSE REPRESENTATIONS WERE FALSE, AGAIN, TOTALLY
10:10AM 6 FAIR GAME.
10:10AM 7 WHAT I'M SUGGESTING ABOUT A REDACTION EXERCISE IS WHAT I
10:10AM 8 DON'T WANT THE JURY TO BE ALLOWED TO SEE IS EVEN IF THERE'S NO
10:10AM 9 EXPLICIT ARGUMENT, THE JURY CAN'T SEE TWO DIFFERENT VERSIONS
10:10AM 10 AND SAY, OH, THEY DOCTORED IT UP, THEY COOKED IT UP. RIGHT?
10:10AM 11 AND I THINK AN EASY SOLUTION TO THAT WOULD BE, IF THE
10:10AM 12 GOVERNMENT PREFERS, TO STRIP AWAY THE PHARMACEUTICAL LOGO, OR
10:10AM 13 IF THE COURT THINKS IT WANTS TO BE MORE EVENHANDED, STRIP AWAY
10:10AM 14 BOTH LOGOS. I'M COMPLETELY INDIFFERENT ON THAT POINT,
10:10AM 15 YOUR HONOR.
10:10AM 16 I'M PERFECTLY FINE WITH THE JURY SEEING THE REPORTS
10:10AM 17 KNOWING THAT THE PHARMACEUTICAL WITNESSES WILL SAY, NO, I DON'T
10:10AM 18 THINK THAT THAT REFLECTS OUR VIEWS; AND KNOWING THAT THE
10:10AM 19 INVESTORS SAID, YEAH, I THOUGHT THEY HAD BEEN COMPREHENSIVELY
10:10AM 20 VALIDATED, THIS GAVE ME GREAT CONFIDENCE.
10:10AM 21 THAT IS FODDER FOR CROSS-EXAMINATION. THAT IS FODDER FOR
10:10AM 22 TRIAL. I WOULD NOT BE HERE TRYING TO KEEP THAT OUT.
10:10AM 23 THAT WOULD BE THE LIAR, LIAR TACTIC, YOU KNOW, IT'S BAD
10:11AM 24 FOR MY CASE SO I WANT YOU TO KEEP IT OUT.
10:11AM 25 WHAT I DO WANT KEPT OUT, YOUR HONOR, IS THE EVIDENCE OF

10:11AM 1 DOCTORING, THAT NARROW, NARROW CATEGORY OF EVIDENCE, THOSE
10:11AM 2 CHANGES THAT WERE MADE IN APRIL OF 2010, BECAUSE THERE'S NO
10:11AM 3 TETHER TO MR. BALWANI.

10:11AM 4 THE COURT: SO YOU HAVE NO QUARREL WITH THE
10:11AM 5 ORIGINAL, BUT YOU DON'T WANT THE, THE ALTERED DOCUMENT?

10:11AM 6 MR. BRECHER: I DON'T WANT THE ALTERED DOCUMENT IN A
10:11AM 7 WAY THAT WOULD REFLECT THAT IT'S ALTERED. I'M PERFECTLY
10:11AM 8 FINE --

10:11AM 9 THE COURT: HOW DO WE DO THAT?

10:11AM 10 MR. BRECHER: OH, WELL, THROUGH WHAT I SUGGESTED
10:11AM 11 WOULD BE ONE WAY, YOUR HONOR, THROUGH REDACTING THE LOGOS.

10:11AM 12 THE COURT: I SEE. OKAY.

10:11AM 13 MR. BRECHER: RIGHT?

10:11AM 14 THE COURT: SURE.

10:11AM 15 MR. BRECHER: SOME UNIFORM VERSION OF THE DOCUMENT.

10:11AM 16 AM I CLEAR ON THAT, YOUR HONOR?

10:11AM 17 THE COURT: I THINK YOU ARE.

10:11AM 18 LET ME ASK MS. VOLKAR IF SHE IS.

10:11AM 19 MS. VOLKAR: I THINK MY COLLEAGUE'S COMMENTS FURTHER
10:11AM 20 SHOWS WHY AN ORDER ON THIS POINT WOULD BE UNNECESSARY.

10:11AM 21 ESSENTIALLY WHAT HE'S ASKING FOR IS THE GOVERNMENT NOT TO PUT
10:11AM 22 THE TWO, THE UNALTERED AND ALTERED DOCUMENT NEXT TO EACH OTHER
10:11AM 23 AS WE DID, AND I AGAIN JUST SIMPLY CANNOT SEE ANY BASIS, ANY
10:12AM 24 LEGAL BASIS FOR EXCLUDING THE GOVERNMENT FROM MAKING THAT
10:12AM 25 POINT, THAT THIS IS WHAT THE PHARMACEUTICAL THAT MR. WEBER AND

10:12AM 1 DR. CULLEN RECEIVED, AND THIS IS WHAT INVESTORS RECEIVED.

10:12AM 2 IF WE'RE SAYING THAT THOSE TWO THINGS ARE ADMISSIBLE, I'M

10:12AM 3 REALLY NOT SEEING WHY THE GOVERNMENT'S HANDS SHOULD BE TIED TO

10:12AM 4 NOT PUT THEM SIDE BY SIDE TO SHOW, FOR EXAMPLE, FALSITY,

10:12AM 5 FALSITY IN TERMS OF WHAT WAS TOLD TO THE INVESTORS.

10:12AM 6 THE COURT: WELL, THAT'S WHAT I'M TRYING -- I'M

10:12AM 7 SORRY TO INTERRUPT YOU, MS. VOLKAR, BUT THAT'S WHAT I'M TRYING

10:12AM 8 TO UNDERSTAND, IS EVIDENCE WILL SHOW THAT THESE TWO

10:12AM 9 INDIVIDUALS, THEY'LL TALK ABOUT WHAT THEIR COMPANIES DID OR

10:12AM 10 DIDN'T DO, AND THEN INVESTORS WILL BE SHOWN A DIFFERENT, IS

10:12AM 11 THIS WHAT YOU RECEIVED? YES, NO.

10:12AM 12 DID YOU TAKE ACTION BASED ON THIS? WAS IT MATERIAL TO

10:12AM 13 YOUR DECISION. YES, NO.

10:12AM 14 ISN'T THAT OKAY?

10:13AM 15 MR. BRECHER: YES.

10:13AM 16 AND I APOLOGIZE, YOUR HONOR, APPARENTLY I'VE BEEN UNCLEAR.

10:13AM 17 YES, THAT IS FINE.

10:13AM 18 THE ISSUE IS PRECISELY WHAT MS. VOLKAR ARTICULATED, IT'S

10:13AM 19 THE SIDE-BY-SIDE COMPARISON.

10:13AM 20 THE COURT: AND SO IS IT JUST THE VISUAL YOU DON'T

10:13AM 21 WANT?

10:13AM 22 MR. BRECHER: NO, IT'S NOT THE VISUAL. IF THE COURT

10:13AM 23 IS SATISFIED -- ANOTHER ALTERNATIVE WOULD BE ONLY TO ADMIT THE

10:13AM 24 ALTERED VERSION, OR ONLY TO ADMIT THE UNALTERED VERSION. I'M

10:13AM 25 TRULY INDIFFERENT.

10:13AM 1 WHAT GOES TO FALSITY, YOUR HONOR, IS THE SUGGESTION THAT
10:13AM 2 PHARMACEUTICAL COMPANIES HAVE COMPREHENSIVELY VALIDATED THE
10:13AM 3 TECHNOLOGY. THOSE WITNESSES, I EXPECT, IF THEY TESTIFY
10:13AM 4 CONSISTENT TO HOW THEY DID IN THE LAST TRIAL, WILL SAY, NO,
10:13AM 5 THAT'S NOT TRUE.

10:13AM 6 I'M FINE WITH THAT. RIGHT?

10:13AM 7 IT IS THE EXTREMELY DAMNING, NARROW SLIVER OF
10:13AM 8 MS. HOLMES -- AND WE KNOW IT WAS MS. HOLMES GOING IN AND MAKING
10:13AM 9 CHANGES TO BEEF UP THE REPORTS.

10:13AM 10 THE COURT: I SEE. SO YOUR QUARREL IS, WELL, IF
10:13AM 11 THEY SEE THAT, WE KNOW, IF WE BELIEVE MS. HOLMES'S TESTIMONY,
10:14AM 12 SHE DID IT.

10:14AM 13 MR. BRECHER: YES.

10:14AM 14 THE COURT: NOBODY ASKED HER ON DIRECT OR CROSS, DID
10:14AM 15 ANYONE HELP YOU? WHO ELSE HELPED YOU WITH IT?

10:14AM 16 I DON'T RECALL ANY QUESTION LIKE THAT.

10:14AM 17 MR. BRECHER: THERE WERE NO SUCH QUESTIONS,
10:14AM 18 YOUR HONOR.

10:14AM 19 THE COURT: AND SO YOUR --

10:14AM 20 MR. BRECHER: I'M SORRY.

10:14AM 21 THE COURT: AND SO YOUR OBJECTION IS, WELL, IF THE
10:14AM 22 ALTERED IS UP THERE AND THERE'S NO -- EVEN IF THERE'S NO
10:14AM 23 MENTION OF IT IN OUR TRIAL, EVERYONE IS GOING TO LOOK AT MY
10:14AM 24 CLIENT BECAUSE HE'S THE ONLY ONE AT THE DEFENDANT'S TABLE.

10:14AM 25 MR. BRECHER: PRECISELY RIGHT, YOUR HONOR. THAT'S

10:14AM 1 THE 403 ISSUE.

10:14AM 2 THERE'S ALSO, OF COURSE, THE VICARIOUS LIABILITY ISSUE.

10:14AM 3 I'LL SPEAK TO THAT FOR JUST 30 SECONDS.

10:14AM 4 YES, THE COURT IS NOT BOUND BY MS. HOLMES'S TESTIMONY.

10:14AM 5 BUT LET'S NOT KID OURSELVES. THE GOVERNMENT ABSOLUTELY

10:14AM 6 BELIEVED THAT ADMISSION. THEY TRUMPETED IT IN THEIR CLOSING.

10:14AM 7 I THINK, HAD THE COURT PERMITTED IT, MR. SCHENK MIGHT HAVE BEEN

10:14AM 8 WILLING TO SHOUT IT FROM THE ROOFTOPS. THEY LOVED THAT

10:15AM 9 EVIDENCE.

10:15AM 10 WE KNOW THAT'S WHAT THEY SAID. WE KNOW THAT'S AN

10:15AM 11 ADMISSION. WE DIDN'T HAVE A CHANCE TO FOLLOW UP AND GET THE

10:15AM 12 DETAILS.

10:15AM 13 AND OF COURSE THE GOVERNMENT, BECAUSE THEY'RE TRYING OUR

10:15AM 14 DEFENDANT NEXT, DIDN'T HAVE ANY INCENTIVE TO ASK THAT QUESTION.

10:15AM 15 SO THAT'S THE UNFAIRNESS. THAT'S THE 403 ISSUE.

10:15AM 16 AGAIN, IT REALLY IS NARROWLY FOCUSED. I'M COMPLETELY

10:15AM 17 UNINTERESTED IN STOPPING THE GOVERNMENT IN SOME SORT OF BROAD

10:15AM 18 BASED WAY FROM SAYING THAT PHARMACEUTICAL COMPANIES DIDN'T

10:15AM 19 COMPREHENSIVELY VALIDATE THE TECHNOLOGY. WE JUST HAVE TO LIVE

10:15AM 20 WITH THAT AND LIVE ON CROSS-EXAMINATION AND ARGUMENT.

10:15AM 21 THE COURT: OKAY.

10:15AM 22 MR. BRECHER: BUT WHAT THEY CAN'T SAY IS

10:15AM 23 MR. BALWANI, OR MS. HOLMES, OR SOMEONE, ALTERED THESE REPORTS,

10:15AM 24 BECAUSE THEY DON'T SATISFY THE VICARIOUS LIABILITY STANDARD AND

10:15AM 25 THERE'S NO TIE TO MR. BALWANI.

10:15AM 1 THE COURT: I HAVE NOT ASKED MS. VOLKAR IF THAT'S
10:15AM 2 WHAT THE GOVERNMENT INTENDS TO DO, TO SAY HE DID IT BECAUSE OF
10:15AM 3 THEIR RELATIONSHIP.

10:15AM 4 IT SOUNDS LIKE THAT'S WHAT THE INFERENCE WOULD BE AND
10:15AM 5 PERHAPS THE CLOSING ARGUMENT WOULD BE.

10:16AM 6 MS. VOLKAR: YOUR HONOR, WE'LL HAVE TO WAIT AND SEE
10:16AM 7 EXACTLY HOW THE EVIDENCE COMES IN.

10:16AM 8 OF COURSE FOR CLOSING ARGUMENT, I THINK WHAT I WOULD
10:16AM 9 IMAGINE, AND I MAY BE EXTRAPOLATING TOO FAR HERE, IS WE
10:16AM 10 PROBABLY WOULD POINT TO WHAT I DID IN MY BRIEF, WHICH IS THE
10:16AM 11 EMAIL TO WAL-MART THAT WENT NOWHERE, AND THEN THE EMAIL THAT
10:16AM 12 WENT TO WALGREENS AND SAFEWAY AND WENT SOMEWHERE.

10:16AM 13 AND MORE IMPORTANTLY, ONE, I WANT TO SAY THAT BECAUSE THE
10:16AM 14 GOVERNMENT USED THE EVIDENCE THAT WAS IN MS. HOLMES'S TRIAL,
10:16AM 15 THE FACT THAT SHE ADMITTED SHE DID IT IN CLOSING ARGUMENT
10:16AM 16 DOESN'T HELP THEIR 403 ARGUMENT HERE.

10:16AM 17 IF MR. BALWANI TOOK THE STAND AND SAID, I DISCUSSED IT
10:16AM 18 WITH HER, I INSTRUCTED HER TO CHANGE THE LOGOS, WE WOULD ALSO
10:16AM 19 REFERENCE THAT IN OUR CLOSING AND THERE WOULDN'T BE ANY
10:16AM 20 CONTRADICTION BETWEEN THOSE TWO THINGS.

10:16AM 21 BUT MORE IMPORTANTLY THAN THAT, I WANT TO GET BACK TO THE
10:16AM 22 SOLUTION MY COLLEAGUE IS PROPOSING, WHICH IS ONE VERSION OF THE
10:16AM 23 REPORT, SOME WAY WE CAN AGREE ON ONE VERSION OF THE REPORT SO
10:16AM 24 THERE'S NO WAY THAT THE JURY KNOWS THAT THEY WERE ALTERED.

10:16AM 25 PRACTICALLY, HOW DO WE DO THAT, YOUR HONOR? AND I'M NOT

10:17AM 1 TRYING TO BE CUTE HERE, BUT THE PHARMACEUTICAL WITNESSES NEVER
10:17AM 2 SAW THE VERSION WITH THE LOGO.

10:17AM 3 YES, MS. HOLMES SENT BACK TO PFIZER A VERSION WITH THE
10:17AM 4 LOGO IN, LIKE, 2015. BUT AT THE TIME, IN THIS 2010 PERIOD
10:17AM 5 WE'RE TALKING ABOUT, THE PHARMA WITNESSES THAT WE CALLED LAST
10:17AM 6 TIME, MR. WEBER AND DR. CULLEN, AND I EXPECT WE MAY CALL THEM
10:17AM 7 IN THIS TRIAL, THEY NEVER SAW THE VERSION WITH THE LOGO.

10:17AM 8 AND IF WE ARE TO DO AS MY COLLEAGUE SUGGESTS AND STRIP
10:17AM 9 THAT PHARMACEUTICAL LOGO OFF AND SHOW IT TO THE INVESTORS, I
10:17AM 10 WOULD POSIT THAT THEY WOULD EXPRESS SURPRISE.

10:17AM 11 MULTIPLE OF THE WITNESSES, MR. MOSLEY, LISA PETERSON,
10:17AM 12 ALAN EISENMAN ALL SAID THAT THEY KEYED IN ON THOSE LOGOS. THEY
10:17AM 13 FOCUSSSED ON THAT. THAT WAS A BIG PORTION OF WHAT WAS
10:17AM 14 CONVINCING TO THEM. THAT WAS PART OF THEIR RELIANCE.

10:17AM 15 SO I'M HAVING A HARD TIME OF ENVISIONING A VERSION OF SOME
10:18AM 16 COMBINED UNALTERED REPORT THAT CAN SATISFY THOSE TWO DIFFERENT
10:18AM 17 WITNESSES.

10:18AM 18 IT SIMPLY IS PART OF THE STORY, YOUR HONOR. IT REALLY IS
10:18AM 19 THE FACT THAT THE ALTERING OF THE PHARMA LOGOS WAS ONE OF THE
10:18AM 20 FALSE MISREPRESENTATIONS.

10:18AM 21 SO THAT BRINGS ME BACK TO FALSITY, AND IF THERE IS A
10:18AM 22 LIMITING INSTRUCTION, PERHAPS IT'S THAT THE JURY CAN ONLY
10:18AM 23 CONSIDER THE ALTERING OF THE LOGOS FOR FALSITY AND NOT
10:18AM 24 KNOWLEDGE.

10:18AM 25 AGAIN, THE GOVERNMENT DISAGREES WITH THAT.

10:18AM 1 AND I GO BACK TO WHERE MY COLLEAGUE STARTED, OR WAS AT A
10:18AM 2 FEW MINUTES AGO, THAT WE HAVE TO SORT OF PROVE BY A
10:18AM 3 PREPONDERANCE OF THE EVIDENCE.

10:18AM 4 I DID NOT SEE A CASE IN THEIR MOTION OR REPLY THAT
10:18AM 5 ACTUALLY REQUIRES THAT.

10:18AM 6 THEY CITE BOURJAILY, WHICH SAYS FOR COCONSPIRATOR
10:18AM 7 STATEMENTS TO GET AROUND HEARSAY UNDER RULE 801(B) (2) (E), THE
10:18AM 8 GOVERNMENT MUST MEET THAT BURDEN.

10:18AM 9 I HAVE NOT YET SEEN A CASE THAT SAYS THAT WE HAVE TO MEET
10:18AM 10 THIS HIGHER BAR. AND, AGAIN, EVEN IF WE DO -- AND PERHAPS I'M
10:19AM 11 JUST UNAWARE OF THE CASE, THEY DIDN'T CITE ONE -- I THINK THAT
10:19AM 12 WE HAVE MET IT HERE FOR ALL OF THE REASONS THAT I SAID EARLIER
10:19AM 13 TODAY.

10:19AM 14 THE COURT: THANK YOU.

10:19AM 15 MR. BRECHER: YOUR HONOR, I HAVE TO RESPOND TO THAT
10:19AM 16 LAST POINT.

10:19AM 17 FIRST, THE GOVERNMENT DOESN'T NEED LOGOS TO PROVE THE
10:19AM 18 FALSITY ELEMENT.

10:19AM 19 AND AS FOR WHAT LATER WITNESSES MIGHT SAY, ONE, PARTIES
10:19AM 20 ROUTINELY INSTRUCT WITNESSES TO GUARD THEMSELVES AROUND THE
10:19AM 21 COURT'S EVIDENTIARY RULINGS. THAT'S A STANDARD NOT ONLY
10:19AM 22 FEATURE AT TRIAL PRACTICE, IT'S A RESPONSIBILITY OF EXAMINING
10:19AM 23 ATTORNEYS.

10:19AM 24 SECOND, GIVEN THE GOVERNMENT'S OWN MIL'S, I DON'T THINK
10:19AM 25 IT'S APPROPRIATE TO TALK ABOUT INDIVIDUAL INVESTOR'S RELIANCE.

10:19AM 1 THAT'S NOT AN ELEMENT THAT THE GOVERNMENT HAS TO PROVE.

10:19AM 2 THE GOVERNMENT TRIED TO STOP THE DEFENDANTS, AND I THINK

10:19AM 3 IT SUCCEEDED IN STOPPING DEFENDANTS, FROM INTRODUCING THAT SORT

10:19AM 4 OF EVIDENCE. THEY SHOULDN'T GET TO INTRODUCES IT WHEN THE SHOE

10:19AM 5 IS ON THE OTHER FOOT.

10:19AM 6 BUT SECOND, AS TO THE PREPONDERANCE STANDARD, BOURJAILY,

10:19AM 7 YES, THAT PARTICULAR CASE AROSE IN THE CONTEXT OF COCONSPIRATOR

10:20AM 8 STATEMENTS, WHICH ARE OF COURSE CONCEPTUALLY CLOSELY ANALOGOUS

10:20AM 9 TO THIS SCENARIO.

10:20AM 10 BUT HERE'S WHAT BOURJAILY HAD TO SAY, "WE ARE THEREFORE

10:20AM 11 GUIDED BY OUR PRIOR DECISIONS REGARDING ADMISSIBILITY

10:20AM 12 DETERMINATIONS THAT HINGE ON PRELIMINARY FACTUAL QUESTIONS. WE

10:20AM 13 HAVE TRADITIONALLY REQUIRED THAT THESE MATTERS BE ESTABLISHED

10:20AM 14 BY A PREPONDERANCE OF PROOF."

10:20AM 15 WHAT BOURJAILY IS SAYING, IN FACT, WHAT BOURJAILY IS

10:20AM 16 REJECTING IS THE CRIMINAL DEFENDANT IN THAT CASE SAID, ONE, YOU

10:20AM 17 CAN'T RELY ON THE HEARSAY STATEMENTS THEMSELVES AS PART OF THAT

10:20AM 18 PRELIMINARY SHOWING, AND THE SUPREME COURT SAID, YES, YOU CAN.

10:20AM 19 AND THEY SAID THERE SHOULD BE A HIGHER STANDARD, SINCE

10:20AM 20 THIS IS A CRIMINAL CASE, THAN PREPONDERANCE, AND THE SUPREME

10:20AM 21 COURT SAID, NO, PREPONDERANCE IS THE STANDARD SHOWING NEEDED AT

10:20AM 22 THAT 104 PRELIMINARY QUESTION GROUND.

10:20AM 23 SO I JUST WANTED TO RESPOND TO THAT BRIEF POINT.

10:20AM 24 OTHER THAN THAT, YOUR HONOR, I KNOW THAT THE COURT HAS

10:20AM 25 GIVEN THIS SUBSTANTIAL ATTENTION AND I APPRECIATE THAT.

10:20AM 1 THE COURT: NO. THANK YOU FOR THE CONVERSATION,

10:20AM 2 BOTH OF YOU.

10:20AM 3 ONE THING THAT YOU DIDN'T TALK ABOUT IS FOUND ON PAGE 2,

10:20AM 4 ECF PAGE 2 OF 1337, AND THE TIMELINESS OF THE MOTION.

10:21AM 5 I THINK THE REPLY WAS FILED YESTERDAY, I BELIEVE IT WAS.

10:21AM 6 MR. BRECHER: YES.

10:21AM 7 THE COURT: WITH GREAT CONFIDENCE HE SAYS, YES, IT

10:21AM 8 WAS.

10:21AM 9 MR. BRECHER: I'M HAPPY TO SPEAK TO THAT.

10:21AM 10 THE COURT: NO, NO.

10:21AM 11 WE RECEIVED THAT, AND THEN IN A FOOTNOTE ON THE PAGE THAT

10:21AM 12 I JUST MENTIONED, FOOTNOTE 1 INDICATES THE GOVERNMENT, AS WE

10:21AM 13 KNOW, COMMITS NOT TO MENTION THIS, AND I APPRECIATE THAT. THAT

10:21AM 14 TAKES SOME TIME PRESSURE OFF OF THE COURT AS TO WHEN IT WILL

10:21AM 15 LET YOU KNOW, BY ORDER OR OTHERWISE, THE DECISION AS TO THIS

10:21AM 16 MOTION.

10:21AM 17 IT SOUNDS LIKE -- LET ME JUST SAY, WHEN I LOOKED AT THIS

10:21AM 18 MOTION, IN THE SPIRIT OF FULL DISCLOSURE, I SAID, IS THIS ONE

10:21AM 19 OF, LOOKING AT OUR, AT THE MIL ORDERS -- YOU KNOW, I USE THIS

10:21AM 20 PHRASE OFTEN IN THOSE, AS YOU KNOW -- IS THIS SOMETHING THAT

10:21AM 21 SHOULD BE DEFERRED UNTIL THERE'S A FOUNDATION OR WHAT?

10:21AM 22 AND THEN MY CONCERN WAS, WELL, THAT'S NOT FAIR TO THE

10:22AM 23 PARTIES BECAUSE THEY WANT TO TELL THE JURY IN THEIR OPENING

10:22AM 24 STATEMENTS WHAT THEY CAN EXPECT TO HEAR.

10:22AM 25 AND THE TIMING OF THIS CAUSED ME SOME CONCERN. THE

10:22AM 1 GOVERNMENT SAID, WE'RE NOT GOING TO TALK ABOUT THIS IN OUR
10:22AM 2 OPENING, AND I APPRECIATE THAT. THAT GIVES THE COURT A LITTLE
10:22AM 3 BIT OF LATITUDE.

10:22AM 4 IT GIVES YOU SOME LATITUDE AS WELL FROM YOUR TEAMS, I
10:22AM 5 THINK.

10:22AM 6 MR. BRECHER: WELL, YOUR HONOR, THIS KILLS ME TO
10:22AM 7 SAY, AND MS. VOLKAR CAN CORRECT ME IF I'M MISTAKEN, BUT I DON'T
10:22AM 8 KNOW HOW MUCH LATITUDE THERE IS.

10:22AM 9 AGAIN, THE GOVERNMENT CAN CORRECT ME, BUT MY UNDERSTANDING
10:22AM 10 BASED, ON RECENT DISCLOSURES, IS THAT THEY PLAN TO CALL SOME OF
10:22AM 11 THESE PHARMACEUTICAL COMPANY WITNESSES QUITE EARLY IN THEIR
10:22AM 12 CASE-IN-CHIEF.

10:22AM 13 THEY DID MAKE THAT REPRESENTATION ABOUT THEIR OPENING
10:22AM 14 STATEMENT, WHICH I VERY MUCH CONSIDERED.

10:22AM 15 I'M HAPPY TO SPEAK TO THE TIMELINESS ISSUE. I THINK IT'S
10:22AM 16 JUST SORT OF A BRIEF MATTER.

10:22AM 17 AS THE COURT KNOWS, THE PARTIES CAN RAISE EVIDENTIARY
10:22AM 18 OBJECTIONS IN TRIAL, AND WE COULD HAVE FILED THIS IDENTICAL
10:22AM 19 BRIEF THE MORNING THAT MR. WEBER WAS SCHEDULED TO GET ON THE
10:22AM 20 STAND.

10:22AM 21 WE FILED IT UNDER THE NORMAL NOTING PERIOD ALLOWED BY THE
10:22AM 22 LOCAL RULES. THE GOVERNMENT HAD THE FULL RESPONSE PERIOD
10:23AM 23 ALLOWED BY THE LOCAL RULES. IT'S ONLY THE HEARING DATE THAT
10:23AM 24 HAS BEEN PUSHED UP A FEW DAYS TO MAKE SURE WE'RE AHEAD OF
10:23AM 25 OPENINGS.

10:23AM 1 I THINK, AND AS THE CASES THAT WE CITE IN OUR REPLY POINT

10:23AM 2 OUT, ALLOWING THIS PROCESS TO PLAY OUT THE WAY IT IS, IS BETTER

10:23AM 3 THAN WAITING UNTIL THE NIGHT BEFORE OR THE MORNING OF. IT

10:23AM 4 GIVES THE COURT AT LEAST SOME TIME, AND AS EXCELLENT AS

10:23AM 5 MS. VOLKAR IS, AND I'VE KNOWN HER FOR SOME TIME, I KNOW SHE CAN

10:23AM 6 WRITE A KILLER BRIEF OVERNIGHT.

10:23AM 7 I DON'T KNOW IF SHE CAN WRITE A KILLER BRIEF IN FOUR

10:23AM 8 MINUTES, WHICH IS WHAT WOULD HAPPEN IF WE BROUGHT THIS TYPE OF

10:23AM 9 MOTION THE MORNING OF.

10:23AM 10 SO I'M HAPPY TO SPEAK TO IT, YOUR HONOR.

10:23AM 11 THE COURT: MAYBE FIVE OR SIX MINUTES.

10:23AM 12 MR. BRECHER: I'D SAY AT LEAST SEVEN, BUT SHE IS

10:23AM 13 VERY GOOD, YOUR HONOR.

10:23AM 14 KNOWING, YOUR HONOR, THAT AT LEAST ONE PRONG OF OUR

10:23AM 15 MOTION, WHICH IS THE 403 ELEMENT, DIDN'T ARISE UNTIL AFTER THE

10:23AM 16 MIL DEADLINE. AND OF COURSE WE BROUGHT THIS UP IN A MEET AND

10:23AM 17 CONFER AND WHEN WE LEARNED WE SWIFTLY MOVED.

10:23AM 18 THE COURT: SURE. I APPRECIATE IT. I APPRECIATE

10:23AM 19 THE FACT THAT YOU ARE USING THE MEET AND CONFER PROCESS TO MAKE

10:24AM 20 THE TRIAL MORE EFFICIENT, WHILE ALLOWING YOU BOTH TO DO WHAT

10:24AM 21 YOU NEED TO DO ON EACH SIDE, AND I'M GRATEFUL FOR THAT.

10:24AM 22 AND I THINK THE OBJECTION FROM THE GOVERNMENT WAS, WELL,

10:24AM 23 THE LAST DAY TO FILE MOTIONS WAS NOVEMBER, OR SOMETHING LIKE

10:24AM 24 THAT.

10:24AM 25 AS YOU POINT OUT, THE TRIAL IS A FLUID PROCESS. THINGS

10:24AM 1 HAPPEN. I APPRECIATE THE FACT THAT YOU RESPECT THAT FILING A
10:24AM 2 MOTION THE NIGHT BEFORE, THE MORNING OF, IS -- AND I'VE USED
10:24AM 3 THE PHRASE BEFORE -- MOZART TO A JUDGE'S EAR. IT'S PROBABLY
10:24AM 4 MORE LIKE LED ZEPPELIN TO CERTAIN JUDGE'S EARS.
10:24AM 5 MR. BRECHER: I UNDERSTAND. I CAN'T SAY THAT WILL
10:24AM 6 NEVER HAPPEN. BUT ALWAYS, AS YOUR HONOR POINTED OUT, IT'S A
10:24AM 7 FLUID PROCESS. I THINK THE PHRASE IN THE HOLMES TRIAL YOU USED
10:24AM 8 WAS A MOVABLE FEAST ON A RELATED ISSUE.
10:24AM 9 BUT ONCE THIS ISSUE CAME TO OUR MINDS AND WE CONFERRED
10:25AM 10 WITH THE GOVERNMENT, WE MOVED SWIFTLY AND WANTED TO PUT IT IN
10:25AM 11 FRONT OF YOU.
10:25AM 12 SO THANK YOU FOR HEARING US TODAY.
10:25AM 13 THE COURT: THANK YOU SO MUCH. MATTER IS UNDER
10:25AM 14 SUBMISSION. THANK YOU SO MUCH.
10:25AM 15 MS. VOLKAR: THANK YOU, YOUR HONOR. AND THANK YOU
10:25AM 16 FOR THE KIND WORDS.
10:25AM 17 THE COURT: SO I BELIEVE -- LET'S MOVE ON TO ANOTHER
10:25AM 18 ISSUE. THE RECORD SHOULD REFLECT IT'S 10:25.
10:25AM 19 I BELIEVE WE ASKED THOSE SIX JURORS TO COME BACK THIS
10:25AM 20 MORNING.
10:25AM 21 ARE THEY HERE?
10:25AM 22 THE CLERK: THEY ARE HERE.
10:25AM 23 THE COURT: GREAT. SO, COUNSEL, DO YOU WANT TO TAKE
10:25AM 24 A MOMENT TO REGROUP ON THIS?
10:25AM 25 MR. SCHENK, MR. COOPERSMITH.

10:25AM 1 MR. SCHENK: THANK YOU, YOUR HONOR.

10:25AM 2 YES, I THINK THAT WOULD BE GREAT, JUST A FEW MINUTES MAYBE

10:25AM 3 WHILE THE JURY IS BROUGHT UP.

10:25AM 4 AND THEN IS THE PLAN TO DO THE SAME THING THAT WE DID

10:25AM 5 YESTERDAY WITH THE GROUP, AND THAT IS, SORT OF BEGIN THE

10:25AM 6 QUESTIONS WITH ALL OF THEM IN THE COURTROOM TO DETERMINE

10:25AM 7 WHETHER INDIVIDUAL VOIR DIRE OF THIS, I BELIEVE IT'S SIX OR SO

10:26AM 8 INDIVIDUALS, IS NECESSARY?

10:26AM 9 THE COURT: THAT WAS MY THOUGHT.

10:26AM 10 MR. COOPERSMITH.

10:26AM 11 MR. COOPERSMITH: YES. AS I SAID YESTERDAY, THAT

10:26AM 12 WAS CERTAINLY BETTER THAN TRYING TO DO IT WITH THE WHOLE VENIRE

10:26AM 13 PANEL HERE.

10:26AM 14 IT IS AWKWARD TO TRY TO GET AT WHAT THEIR KNOWLEDGE IS

10:26AM 15 ABOUT THE RELATIONSHIP IN THE GROUP SETTING. I THINK THE TWO

10:26AM 16 THAT WERE BROUGHT IN YESTERDAY WERE -- THAT WAS MORE EFFECTIVE

10:26AM 17 AND IT DIDN'T TAKE TOO MUCH TIME.

10:26AM 18 THE COURT: RIGHT.

10:26AM 19 MR. COOPERSMITH: BUT THAT'S OUR PREFERENCE.

10:26AM 20 BUT, AGAIN, THE GROUP OF 6 IS BETTER THAN A GROUP OF 40.

10:26AM 21 THE COURT: WELL, LET'S START WITH THEM, AND THEN

10:26AM 22 YOUR ARTFUL QUESTIONING WILL DEVELOP WHETHER AND WHEN WE NEED

10:26AM 23 TO GO AND SPEAK INDIVIDUALLY, AND YOU SHOULD JUST LET ME KNOW

10:26AM 24 AND NOT BE SHY ABOUT SAYING, JUDGE, CAN WE STOP HERE AND MAYBE

10:26AM 25 WE'LL INVITE A PRIVATE CONVERSATION WITH THIS JUROR, OR

10:26AM 1 SOMETHING LIKE THAT.

10:26AM 2 MR. COOPERSMITH: YES, YOUR HONOR. I UNDERSTAND.

10:26AM 3 IN TERMS OF AN AGENDA THAT WE WOULD LIKE TO PROPOSE, YES,

10:26AM 4 THAT'S THE FIRST ITEM OR ORDER OF BUSINESS TODAY, TO DO THIS

10:27AM 5 WITH THE SIX JURORS. THAT'S ABOUT THEIR KNOWLEDGE OF THE

10:27AM 6 RELATIONSHIP.

10:27AM 7 AND THEN WE ALSO HAVE THE ISSUE OF CAUSE AND HARDSHIP

10:27AM 8 ISSUES FROM PANEL ONE FROM THE FIRST DAY, LAST WEDNESDAY.

10:27AM 9 AND THEN AFTER THAT WE CAN TALK MORE ABOUT WHAT THIS JURY

10:27AM 10 LOOKS LIKE BASED ON WHERE THE LANDSCAPE IS.

10:27AM 11 THE COURT: RIGHT. WELL, WHAT I'M HOPING TO DO --

10:27AM 12 THANK YOU.

10:27AM 13 WHAT I'M HOPING TO DO WITH OUR TIME TODAY IS TO DO THAT,

10:27AM 14 ALL OF THAT, AND HOPEFULLY GET A FINAL UNIVERSE OF OUR PANEL

10:27AM 15 TODAY.

10:27AM 16 I'D LIKE US TO BEGIN THE JURY SELECTION PROCESS TODAY,

10:27AM 17 THAT IS, PASSING YOUR SELECTIONS FOR ANY PEREMPTORY CHALLENGES

10:27AM 18 THAT YOU MIGHT HAVE SUCH THAT WE COULD SECURE A JURY AND

10:27AM 19 ALTERNATES TODAY, NOTIFY THOSE INDIVIDUALS TO REPORT TO COURT,

10:27AM 20 SWEAR THEM IN, AND THEN BEGIN THE CASE.

10:27AM 21 I THINK WE CAN DO THAT TODAY.

10:27AM 22 MR. COOPERSMITH: YOUR HONOR, IT'S POSSIBLE. I

10:27AM 23 THINK WE HAVE TO SEE WHAT THE NUMBERS ARE AFTER THE ADDITIONAL

10:28AM 24 CAUSE AND SOME HARDSHIP ISSUES THAT WE NEVER ADDRESSED FROM

10:28AM 25 PANEL ONE.

10:28AM 1 ONCE WE GET THROUGH THAT, THEN WE'LL KNOW WHAT THE NUMBER
10:28AM 2 IS.

10:28AM 3 BUT I THINK THE MINIMUM NUMBER IS 40.

10:28AM 4 THE COURT: RIGHT.

10:28AM 5 MR. COOPERSMITH: AND IF WE HAVE MORE THAN 40, THEN
10:28AM 6 YES.

10:28AM 7 WE HAVE SOME OTHER ISSUES THAT WE WOULD LIKE TO DISCUSS
10:28AM 8 ABOUT THE PROCESS, BUT, YES, IT DEPENDS ON WHAT THE NUMBERS ARE
10:28AM 9 AFTER THE SIX COMING IN AND THEN THE ADDITIONAL STRIKES FROM
10:28AM 10 WEDNESDAY.

10:28AM 11 THE COURT: OKAY.

10:28AM 12 MR. SCHENK: THAT AGENDA SOUNDS GREAT TO THE
10:28AM 13 GOVERNMENT.

10:28AM 14 THE COURT: OKAY. ALL RIGHT. LET'S TAKE A BRIEF
10:28AM 15 BREAK AND WE'LL COME BACK IN ABOUT TEN MINUTES.

10:28AM 16 MR. SCHENK: THANK YOU.

10:28AM 17 (RECESS FROM 10:28 A.M. UNTIL 10:43 A.M.)

10:43AM 18 (PROSPECTIVE JUROR NUMBERS 10, 34, 48, 80, 82, AND 83 IN
10:43AM 19 AT 10:43 A.M.)

10:43AM 20 THE COURT: WE ARE BACK ON THE RECORD IN THE BALWANI
10:44AM 21 MATTER.

10:44AM 22 ALL COUNSEL ARE PRESENT. MR. BALWANI IS PRESENT.

10:44AM 23 WE HAD INVITED BACK CERTAIN PROSPECTIVE JURORS, AND THESE
10:44AM 24 ARE -- AGAIN, I'M GOING TO REFERENCE BY JUROR NUMBERS, PLEASE.

10:44AM 25 WHEN I CALL YOUR NUMBER, IF YOU COULD JUST RAISE YOUR HAND

10:44AM 1 JUST FOR CONFIRMATION.

10:44AM 2 JUROR NUMBER 10. THANK YOU.

10:44AM 3 34. THANK YOU.

10:44AM 4 48. THANK YOU.

10:44AM 5 80.

10:44AM 6 82. THANK YOU.

10:44AM 7 AND 83. THANK YOU.

10:44AM 8 THANK YOU ALL FOR COMING BACK. GOOD MORNING. I APOLOGIZE

10:44AM 9 FOR THE INCONVENIENCE THAT THIS MAY HAVE CAUSED YOU COMING

10:44AM 10 BACK.

10:44AM 11 WE ASKED YOU TO COME BACK TODAY FOR A LIMITED PURPOSE, AND

10:44AM 12 THIS IS IN REGARDS TO THE RESPONSE TO SOME QUESTIONS BOTH ON

10:45AM 13 YOUR QUESTIONNAIRES AND ALSO ON QUESTIONS THAT WERE ASKED

10:45AM 14 YESTERDAY. THIS IS SPECIFICALLY RELATED TO YOUR KNOWLEDGE OF

10:45AM 15 THE HOLMES CASE, I THINK.

10:45AM 16 IS THAT CORRECT, COUNSEL? IS THAT WHAT YOU WOULD LIKE?

10:45AM 17 MR. COOPERSMITH: YOUR HONOR, NO. IT HAS TO DO WITH

10:45AM 18 THE RELATIONSHIP BETWEEN MR. BALWANI AND --

10:45AM 19 THE COURT: I SEE. ALL RIGHT. THANK YOU.

10:45AM 20 THE RELATIONSHIP BETWEEN MR. BALWANI AND MS. HOLMES.

10:45AM 21 AND THERE WERE SOME COMMENTS MADE THAT COUNSEL AND I WOULD

10:45AM 22 LIKE TO FOLLOW UP WITH YOU ON THAT.

10:45AM 23 AND YOU ANSWERED THOSE QUESTIONS IN YOUR QUESTIONNAIRE.

10:45AM 24 YOU RESPONDED TO SOME QUESTIONS OF COUNSEL.

10:45AM 25 WE JUST WANTED TO ASK YOU SOME FOLLOW-UP QUESTIONS THIS

10:45AM 1 MORNING ABOUT THAT. COLLECTIVELY, IT MAY BE THAT WE'LL -- IT
10:46AM 2 MAY BE THAT WE WILL TALK WITH YOU PRIVATELY, INDIVIDUALLY,
10:46AM 3 ABOUT THIS.

10:46AM 4 BUT LET ME SEE. MR. -- WOULD YOU LIKE TO GO FIRST,
10:46AM 5 MR. COOPERSMITH?

10:46AM 6 MR. COOPERSMITH: I'M HAPPY TO, YOUR HONOR.

10:46AM 7 THE COURT: SURE. GO RIGHT AHEAD.

10:46AM 8 MR. COOPERSMITH: MAY I REMOVE MY MASK?

10:46AM 9 THE COURT: YES. THANK YOU.

10:46AM 10 MR. COOPERSMITH: GOOD MORNING, EVERYONE.

10:46AM 11 AGAIN, NOT THAT YESTERDAY YOU HAD A CHOICE, BUT THANK YOU
10:46AM 12 FOR COMING BACK HERE. AS JUDGE DAVILA SAID, I'M SORRY FOR THE
10:46AM 13 IMPOSITION THAT THAT CAUSES TO YOUR SCHEDULES.

10:46AM 14 AS WE SAID THE OTHER DAY WHEN YOU WERE HERE, I BELIEVE IT
10:46AM 15 WAS ON WEDNESDAY, THIS IS A VERY IMPORTANT PROCESS TO MAKE SURE
10:46AM 16 THAT WE CAN HAVE AS FAIR A TRIAL AS POSSIBLE. SO, AGAIN, THANK
10:46AM 17 YOU.

10:46AM 18 AND AS I SAID BEFORE ON WEDNESDAY, THERE ARE NO WRONG
10:46AM 19 ANSWERS TO THE QUESTIONS THAT I'LL ASK. IT'S REALLY JUST A
10:46AM 20 MATTER OF NOT ABOUT YOU PERSONALLY, WHETHER YOU'RE A FAIR
10:46AM 21 PERSON OR GOOD PERSON, JUST WHETHER YOU HAVE CERTAIN KNOWLEDGE
10:47AM 22 THAT COULD BE AN ISSUE, YOU KNOW, WITH SERVING AS A JUROR IN
10:47AM 23 THIS CASE.

10:47AM 24 SO THANK YOU AGAIN.

10:47AM 25 LET ME JUST TELL YOU WHAT THIS IS ABOUT AGAIN. SO FOR

10:47AM 1 SOME OF YOU IN THE QUESTIONNAIRES, AND SOME OF YOU HAVE BY A
10:47AM 2 SHOW OF HANDS, THERE WAS A QUESTION ABOUT WHETHER YOU WERE
10:47AM 3 AWARE OF A RELATIONSHIP, AND SPECIFICALLY A ROMANTIC
10:47AM 4 RELATIONSHIP, BETWEEN MR. BALWANI AND ELIZABETH HOLMES.
10:47AM 5 MR. BALWANI IS THE DEFENDANT WHO IS ON TRIAL IN THIS
10:47AM 6 PROCEEDING, NOT MS. HOLMES.
10:47AM 7 AND THE QUESTION WAS, ARE YOU AWARE OF THE RELATIONSHIP?
10:47AM 8 AND OUR UNDERSTANDING IS THAT ALL OF YOU RAISED YOUR HANDS
10:47AM 9 IN RESPONSE TO THAT.
10:47AM 10 SO LET ME JUST FIRST CONFIRM THAT THAT'S THE CASE TO MAKE
10:47AM 11 SURE THAT WE'VE GOT THE RIGHT PEOPLE, RIGHT.
10:47AM 12 AND SIR, YOU'RE JUROR NUMBER 83?
10:47AM 13 JUROR: I'M SORRY?
10:47AM 14 MR. COOPERSMITH: ARE YOU JUROR NUMBER 83?
10:47AM 15 JUROR: I'M SORRY, I CAN'T --
10:47AM 16 MR. COOPERSMITH: ARE YOU JUROR NUMBER 83?
10:47AM 17 JUROR: YES, YES.
10:48AM 18 MR. COOPERSMITH: AND DID YOU ALSO RAISE YOUR HAND,
10:48AM 19 SIR, IN RESPONSE TO THAT QUESTION?
10:48AM 20 JUROR: YES, I DID.
10:48AM 21 MR. COOPERSMITH: SO MY FIRST QUESTION IS, IS THERE
10:48AM 22 ANYTHING ABOUT YOUR KNOWLEDGE OF THE RELATIONSHIP BETWEEN
10:48AM 23 MR. BALWANI AND MS. HOLMES, AND SPECIFICALLY THE ROMANTIC
10:48AM 24 RELATIONSHIP, THAT GIVES YOU ANY DOUBT THAT YOU COULD BE A FAIR
10:48AM 25 AND IMPARTIAL JUROR?

10:48AM 1 THE COURT: IS THIS FOR THE ENTIRE GROUP?

10:48AM 2 MR. COOPERSMITH: THIS IS FOR THE ENTIRE GROUP.

10:48AM 3 COULD YOU RAISE YOUR HAND IF YOU THINK IT GIVES YOU ANY

10:48AM 4 DOUBT AT ALL HAVING THAT KNOWLEDGE, WHETHER YOU COULD BE FAIR

10:48AM 5 AND IMPARTIAL?

10:48AM 6 SO JUROR NUMBER 34 AND JUROR NUMBER 10, YOU RAISED YOUR

10:48AM 7 HANDS.

10:48AM 8 ANY OTHER RESPONSES?

10:48AM 9 OKAY. I SEE NO OTHER HANDS.

10:48AM 10 NOW, I KNOW THAT, AND MAYBE WE ALL KNOW, THAT ROMANTIC

10:49AM 11 RELATIONSHIPS CAN BE COMPLEX. THAT'S JUST THE WAY THAT LIFE

10:49AM 12 IS.

10:49AM 13 AND MY NEXT QUESTION IS, BY A SHOW OF HANDS, PLEASE RAISE

10:49AM 14 YOUR HAND IF YOU WERE AWARE OF ANYTHING ABOUT THE RELATIONSHIP

10:49AM 15 BETWEEN MS. HOLMES AND MR. BALWANI WHERE THERE WAS SOME

10:49AM 16 DIFFICULTIES IN THE RELATIONSHIP THAT WERE AT LEAST ALLEGED OR

10:49AM 17 REPORTED ON IN THE MEDIA THAT YOU MAY HAVE READ.

10:49AM 18 AND THAT'S JUROR NUMBER 79?

10:49AM 19 JUROR: 80.

10:49AM 20 MR. COOPERSMITH: OH, 80.

10:49AM 21 JUROR: 82.

10:49AM 22 MR. COOPERSMITH: AND?

10:49AM 23 JUROR: 83.

10:49AM 24 MR. COOPERSMITH: ANY OTHER HANDS ON THAT ONE?

10:49AM 25 THANK YOU, YOUR HONOR.

10:49AM 1 THOSE WERE THE QUESTIONS THAT I WANTED TO ASK, YOUR HONOR.

10:49AM 2 CAN WE HAVE A MOMENT?

10:49AM 3 THE COURT: DID YOU WANT TO TALK WITH YOUR TEAM?

10:49AM 4 MR. COOPERSMITH: TO YOUR HONOR.

10:49AM 5 THE COURT: ALL RIGHT. SURE.

10:49AM 6 WITH MR. SCHENK HERE?

10:49AM 7 LET ME ASK YOU THIS, MR. COOPERSMITH, IS IT YOUR --

10:50AM 8 FIRST OF ALL, MR. SCHENK, DO YOU HAVE ANY QUESTIONS?

10:50AM 9 MR. SCHENK: NO. THANK YOU, YOUR HONOR.

10:50AM 10 THE COURT: MR. COOPERSMITH, WOULD YOU LIKE ME TO

10:50AM 11 INVITE ANY OF THESE JURORS TO A PRIVATE CONVERSATION WITH YOU,

10:50AM 12 ME, AND THE GOVERNMENT?

10:50AM 13 MR. COOPERSMITH: YES, YOUR HONOR.

10:50AM 14 AND MAYBE THAT WOULD BE AN EASIER WAY TO DO IT, JUST TO

10:50AM 15 SAY THE JURORS WHO RESPONDED AFFIRMATIVELY IN ONE WAY OR THE

10:50AM 16 OTHER, I THINK THAT WOULD BE HELPFUL.

10:50AM 17 THERE WAS ONE JUROR --

10:50AM 18 I'M SORRY, SIR. YOUR JUROR NUMBER?

10:50AM 19 JUROR: 48.

10:50AM 20 MR. COOPERSMITH: 48. I DON'T THINK JUROR 48 RAISED

10:50AM 21 HIS HAND IN RESPONSE TO EITHER QUESTION, SO I DON'T THINK IT'S

10:50AM 22 NECESSARY FOR JUROR 48.

10:50AM 23 THE COURT: OKAY.

10:50AM 24 MR. COOPERSMITH: BUT FOR THE OTHER JURORS.

10:50AM 25 THE COURT: OKAY. ARE YOU SAYING THAT WE COULD

10:50AM 1 RELEASE JUROR 48 IN YOUR OPINION?

10:50AM 2 MR. COOPERSMITH: YES, YOUR HONOR.

10:50AM 3 THE COURT: FOR PURPOSES OF THIS MORNING?

10:50AM 4 MR. COOPERSMITH: YES, YOUR HONOR.

10:50AM 5 THE COURT: OKAY.

10:50AM 6 MR. SCHENK?

10:50AM 7 MR. SCHENK: I AGREE REGARDING JUROR 48.

10:50AM 8 THE COURT: OKAY. JUROR 48, THANK YOU FOR COMING

10:50AM 9 IN. IT'S GOOD SEEING YOU AGAIN.

10:51AM 10 JUROR: GREAT.

10:51AM 11 THE COURT: YOU'LL BE NOTIFIED AGAIN WHETHER OR NOT

10:51AM 12 YOU NEED TO RETURN AND WHEN THAT WOULD BE, SIR. THANK YOU.

10:51AM 13 JUROR: OKAY. THANK YOU.

10:51AM 14 THE COURT: THANK YOU.

10:51AM 15 (PROSPECTIVE JUROR NUMBER 48 NOT PRESENT.)

10:51AM 16 THE COURT: SO, FOLKS, I THINK WHAT I'D LIKE TO DO

10:51AM 17 IS TO USE THE ROOM BACK HERE, AND THEN WE CAN HAVE A

10:51AM 18 CONVERSATION WITH EACH JUROR PRIVATELY.

10:51AM 19 I DON'T THINK THIS IS GOING TO TAKE VERY LONG.

10:51AM 20 MR. COOPERSMITH? MR. SCHENK?

10:51AM 21 MR. COOPERSMITH: I DON'T THINK EITHER, YOUR HONOR.

10:51AM 22 THE COURT: MR. SCHENK, I DON'T THINK IT WILL.

10:51AM 23 SO, LADIES AND GENTLEMEN, WE'RE GOING TO CALL YOU BACK ONE

10:51AM 24 AT A TIME TO SPEAK WITH US PRIVATELY IN THE BACK ROOM HERE.

10:51AM 25 YOU'LL JUST WAIT HERE. THE BALANCE OF YOU WILL JUST PLEASE SIT

10:51AM 1 HERE AND WAIT UNTIL WE'RE READY FOR YOU OR YOU'RE CALLED TO
10:51AM 2 COME BACK.

10:51AM 3 I DON'T THINK THIS WILL TAKE TOO LONG.

10:52AM 4 IF ANY OF YOU WOULD LIKE ANY REFRESHMENTS WHILE YOU'RE
10:52AM 5 WAITING, PLEASE LET MS. ROBINSON KNOW, AND WE CAN GET YOU
10:52AM 6 WATER. I THINK WE HAVE TEA AVAILABLE AS WELL IF YOU WOULD LIKE
10:52AM 7 SOME.

10:52AM 8 BUT I DON'T THINK THIS WILL TAKE TOO LONG.

10:52AM 9 OKAY. LET'S START WITH JUROR 34 THEN, AND WE'LL HAVE YOU
10:52AM 10 ESCORTED BACK.

10:52AM 11 COUNSEL, WHO IS GOING TO COME BACK? MR. SCHENK?

10:52AM 12 MS. SCHENK: YES, YOUR HONOR.

10:52AM 13 THE COURT: THANK YOU.

10:52AM 14 MR. COOPERSMITH, YOU'RE GOING TO COME BACK, AND YOU WOULD
10:52AM 15 LIKE MS. WALSH TO JOIN YOU?

10:52AM 16 MR. COOPERSMITH: YES, YOUR HONOR.

11:43AM 17 MR. SCHENK: AND WE WOULD LIKE MR. LEACH.

11:43AM 18 THE COURT: ALL RIGHT. THANK YOU.

11:43AM 19 (SIDE-BAR CONFERENCE ON THE RECORD.)

11:43AM 20 (PROSPECTIVE JUROR NUMBER 34 IS PRESENT.)

11:43AM 21 THE COURT: ALL RIGHT. WE'RE ON THE RECORD -- THE
11:43AM 22 FLOOR JUST GOT TALLER OR SOMETHING.

11:43AM 23 WE'RE ON THE RECORD OUTSIDE THE PRESENCE OF THE COURTROOM.

11:43AM 24 WE'RE IN THE JURY DELIBERATION ROOM WITH JUROR NUMBER 34
11:43AM 25 MEETING PRIVATELY WITH COUNSEL, MR. LEACH, MR. SCHENK,

11:43AM 1 MS. WALSH, AND MR. COOPERSMITH.

11:43AM 2 AND, MR. COOPERSMITH, DID YOU HAVE QUESTIONS FOR JUROR 34?

11:43AM 3 MR. COOPERSMITH: YES, YOUR HONOR. THANK YOU.

11:43AM 4 AND WILL YOU BE COMFORTABLE IF I REMOVE MY MASK?

11:43AM 5 PROSPECTIVE JUROR: YES, ABSOLUTELY.

11:43AM 6 MR. COOPERSMITH: OKAY. THANK YOU.

11:43AM 7 AGAIN, THANK YOU FOR YOUR TIME.

11:43AM 8 PROSPECTIVE JUROR: NO WORRIES.

11:43AM 9 MR. COOPERSMITH: AND BEING HONEST. IT'S JUST THAT

11:43AM 10 THIS IS THE PROCESS.

11:43AM 11 PROSPECTIVE JUROR:

11:43AM 12 MR. COOPERSMITH: AND MY FIRST QUESTION FOR YOU IS,

11:43AM 13 YOU RAISED YOUR HAND ABOUT KNOWLEDGE OF THE RELATIONSHIP; IS

11:43AM 14 THAT RIGHT?

11:43AM 15 PROSPECTIVE JUROR: THAT'S RIGHT.

11:43AM 16 MR. COOPERSMITH: AND THEN YOU ALSO SAID JUST NOW

11:43AM 17 YOU WEREN'T SURE IF YOU COULD BE FAIR; IS THAT RIGHT?

11:43AM 18 PROSPECTIVE JUROR: YES.

11:43AM 19 MR. COOPERSMITH: SO I GUESS FOR STARTERS, CAN YOU

11:43AM 20 TELL US WHAT YOU KNOW ABOUT THE RELATIONSHIP BETWEEN

11:43AM 21 MR. BALWANI AND MS. HOLMES?

11:43AM 22 PROSPECTIVE JUROR: YEAH. I CAN SAY I DON'T KNOW

11:43AM 23 THAT MUCH. JUST AS THE COURT ASKED OF KNOWING ANYTHING ABOUT

11:43AM 24 THE CASE, THAT WAS JUST A PIECE OF INFORMATION THAT I KNEW.

11:43AM 25 I DIDN'T FOLLOW THAT SPECIFIC PLOT LINE OR WHATEVER VERY

11:43AM 1 CLOSELY, BUT I JUST KNEW FROM EITHER READING SOMEWHERE OR AT

11:43AM 2 SOME POINT IN THE COURSE OF THE ORIGINAL TRIAL OR WHATEVER THAT

11:43AM 3 THAT WAS THE CASE, BUT I NEVER REALLY FOLLOWED IT VERY CLOSELY.

11:43AM 4 MR. COOPERSMITH: OKAY. AND WHAT, IF ANYTHING,

11:43AM 5 ABOUT THE RELATIONSHIP BETWEEN MR. BALWANI AND MS. HOLMES, EVEN

11:43AM 6 IF YOU DON'T KNOW TOO MUCH ABOUT IT, WHAT ABOUT THAT PROMPTED

11:43AM 7 YOU TO SAY THAT YOU WEREN'T SURE IF YOU COULD BE FAIR?

11:43AM 8 PROSPECTIVE JUROR: YEAH, SO THAT ONE CAME TO ME

11:43AM 9 RIGHT -- REALLY QUICK. THE FIRST THING IS, LIKE, ANY

11:43AM 10 RELATIONSHIP REQUIRES COMMUNICATION AND THINGS LIKE THAT,

11:43AM 11 RIGHT? I MEAN, THIS IS GENERAL.

11:43AM 12 AND SO WHEN YOU ASKED THE QUESTION, THE FIRST THING I

11:43AM 13 THOUGHT WAS, WELL, HOW CAN I SEPARATE THOSE TWO PEOPLE WHO HAVE

11:43AM 14 THAT KIND OF RELATIONSHIP SORT OF STATUS TO NOT HAVE, YOU KNOW,

11:43AM 15 SOME KNOWLEDGE OF WHAT ONE OR THE OTHER IS DOING?

11:43AM 16 AND THEN IT LED ME TO THINK ABOUT THE OUTCOME OF THE

11:43AM 17 ELIZABETH HOLMES TRIAL.

11:43AM 18 SO I THOUGHT TO MYSELF, WELL, IS THERE A COMMUNICATIVE

11:43AM 19 PROPERTY, SOMETHING IN MY HEAD, THAT COULD CLOUD THAT JUDGMENT

11:43AM 20 BECAUSE OF, YOU KNOW, THE RELATIONSHIP AND THEN THE OUTCOME OF

11:43AM 21 THE OTHER?

11:43AM 22 MR. COOPERSMITH: I SEE.

11:43AM 23 PROSPECTIVE JUROR: THAT'S WHY I RAISED MY HAND

11:43AM 24 BECAUSE THERE WAS A DOUBT IN MY HEAD.

11:43AM 25 MR. COOPERSMITH: THANK YOU. IT SOUNDS LIKE YOU DO

11:43AM 1 KNOW ABOUT THE OUTCOME OF THE OTHER CASE?

11:43AM 2 PROSPECTIVE JUROR: I DO.

11:43AM 3 MR. COOPERSMITH: AND WHAT DO YOU KNOW ABOUT THAT?

11:43AM 4 WHAT IS THE OUTCOME?

11:43AM 5 PROSPECTIVE JUROR: I KNOW THERE WAS LIKE, FOUR, I

11:43AM 6 DON'T KNOW IF THE TERM IS COUNTS OF GUILTY. THAT'S PRETTY MUCH

11:43AM 7 ALL I KNOW.

11:43AM 8 MR. COOPERSMITH: OKAY.

11:43AM 9 PROSPECTIVE JUROR: I KNOW, LIKE, IT WASN'T A CLEAN,

11:43AM 10 LIKE, YOU KNOW, NOT GUILTY.

11:43AM 11 MR. COOPERSMITH: IT SOUNDS LIKE YOU KNOW SHE WAS

11:43AM 12 CONVICTED AND FOUND GUILTY OF SOME THINGS?

11:43AM 13 PROSPECTIVE JUROR: YES, YES.

11:43AM 14 MR. COOPERSMITH: AND JUST SO I UNDERSTAND, ARE YOU

11:43AM 15 SAYING THAT BECAUSE YOU KNOW ABOUT THAT, AND YOU ALSO KNOW

11:43AM 16 ABOUT A ROMANTIC RELATIONSHIP, THAT'S IT'S HARD TO UNDERSTAND

11:43AM 17 HOW MR. BALWANI WOULDN'T BE IN THE SAME BOAT AS MS. HOLMES? IS

11:43AM 18 THAT THE --

11:43AM 19 PROSPECTIVE JUROR: YEAH, THAT WAS THE IMMEDIATE

11:43AM 20 THOUGHT WHEN YOU ASKED THE QUESTION. IT WAS LIKE, WELL, I KNOW

11:43AM 21 WITH MY WIFE AND I, IF WE ARE PLANNING ANYTHING, WE PLAN IT

11:43AM 22 TOGETHER.

11:43AM 23 AND IT JUST SO HAPPENS, I MEAN, MY WIFE AND I WORK AT THE

11:43AM 24 SAME COMPANY, TOO, WHICH IS THE CASE. SO WHEN WE TALK ABOUT

11:43AM 25 STUFF AT WORK, WE EACH KNOW WHAT WE'RE DOING.

11:43AM 1 AND WHETHER OUR RELATIONSHIP IS HEALTHY OR NOT, I THINK

11:43AM 2 THERE'S THAT COMMUNICATION AND THERE'S THAT BOND OF WHAT ARE WE

11:43AM 3 GOING TO DO AT WORK KIND OF TOGETHER, ALTHOUGH WE'RE NOT IN THE

11:43AM 4 SAME DEPARTMENT.

11:43AM 5 BUT, YOU KNOW, THAT'S KIND OF WHERE I WAS GOING WITH IT.

11:43AM 6 MR. COOPERSMITH: I UNDERSTAND. AGAIN, THANK YOU.

11:43AM 7 THAT'S WHAT THIS PROCESS IS ABOUT.

11:43AM 8 SO JUST TO TELL YOU, THE JUDGE WILL INSTRUCT YOU IN THIS

11:43AM 9 CASE THAT WHATEVER THE OUTCOME OF MS. HOLMES'S CASE HAS NO

11:43AM 10 BEARING OF WHAT A JURY COULD DECIDE IN THIS CASE; RIGHT?

11:43AM 11 PROSPECTIVE JUROR: YES.

11:43AM 12 MR. COOPERSMITH: AND EVEN THOUGH THAT INSTRUCTION

11:43AM 13 IS GIVEN, DO YOU STILL FEEL IT WOULD BE HARD TO PUT OUT OF YOUR

11:43AM 14 MIND THAT YOU HAVE EXPERIENCE THE WAY YOU COMMUNICATE WITH YOUR

11:43AM 15 SPOUSE AND YOU KNOW MS. HOLMES WAS FOUND GUILTY OF SOMETHING,

11:43AM 16 SO THAT THIS WOULD BE LIKE A DIFFICULT PROCESS FOR YOU?

11:43AM 17 IS THAT FAIR? OR DO YOU THINK YOU COULD COMPLETELY PUT IT

11:43AM 18 OUT OF YOUR MIND? IT DOESN'T MATTER WHAT HAPPENED TO

11:43AM 19 MS. HOLMES, THIS IS A COMPLETELY BLANK SLATE. AND THE COURT

11:43AM 20 WOULD INSTRUCT YOU THAT WAY.

11:43AM 21 PROSPECTIVE JUROR: YEAH. I'M GUESS I'M GOING TO

11:43AM 22 ANSWER AS BLUNTLY AS I CAN. I DON'T KNOW IF I CAN PUT IT OUT

11:43AM 23 OF MY MIND. JUST HOW IN MY RELATIONSHIP HOW THE DYNAMICS WORK

11:43AM 24 AND HOW -- I DON'T EVEN KNOW, LIKE, KIND OF THE GENERAL SETUP

11:43AM 25 OF THE CASE AND HOW IT'S GOING TO WORK, BUT I ASSUME, BASED ON

11:43AM 1 THE KNOWLEDGE OF WHAT I HAVE OF THE THERANOS TRIAL AND JUST
11:43AM 2 THERANOS IN GENERAL, WHICH IS NOT A LOT, THAT THERE HAS TO BE A
11:43AM 3 CONNECTION BETWEEN ONE VERDICT AND THIS ONE.
11:43AM 4 AND I WOULD SAY, YOU KNOW, TO THE JUDGE OF COURSE, LIKE,
11:43AM 5 IF YOU ASKED ME TO TRY TO PUT IT OUT, OF COURSE I WOULD TRY,
11:43AM 6 BUT THERE'S ALWAYS THAT STRAND FOR ME.
11:43AM 7 MR. COOPERSMITH: I APPRECIATE YOUR CANDOR, SIR, SO
11:43AM 8 THANK YOU.
11:43AM 9 THE COURT: SIR, YOU HEARD ME TALK ABOUT THE FOUR
11:43AM 10 MINUTE MILE.
11:43AM 11 PROSPECTIVE JUROR: ABSOLUTELY. AND I GUESS THAT'S
11:43AM 12 THE TOUGH PART ABOUT ANY PART OF THIS, RIGHT? AND I KNOW WHAT
11:43AM 13 YOUR OBLIGATIONS ARE TO THIS, IT'S LIKE HOW DO YOU, HOW DO YOU
11:43AM 14 ASK US TO SEPARATE THAT?
11:43AM 15 AND THAT'S, LIKE, ASKING ME TO REMOVE A PART OF MY SOUL I
11:43AM 16 GUESS.
11:43AM 17 THE COURT: SURE.
11:43AM 18 PROSPECTIVE JUROR: SO I COULD IN MY MIND SAY, OKAY,
11:43AM 19 THERE'S, THERE'S NO RIGHT, LIKE, INNOCENT UNTIL PROVEN GUILTY.
11:43AM 20 BUT, YEAH, HAVING YOU ASK THAT QUESTION, I CAN ONLY TRY.
11:43AM 21 LIKE, I THINK THAT'S THE THING, RIGHT?
11:43AM 22 THE COURT: OKAY.
11:43AM 23 PROSPECTIVE JUROR: LIKE, I'M AN OBJECTIVE PERSON BY
11:43AM 24 NATURE, AND I DON'T TYPICALLY HAVE THESE REALLY SWINGING, LIKE,
11:43AM 25 OR WILD TENETS THAT I HOLD ON TO, BUT I CAN SAY THAT ONCE YOU

11:43AM 1 ASKED THAT QUESTION, IT WAS LIKE I DON'T KNOW IF I CAN.

11:43AM 2 MR. COOPERSMITH: ALL RIGHT. THANK YOU. I

11:43AM 3 APPRECIATE THAT.

11:43AM 4 THE COURT: MR. SCHENK, ANY QUESTIONS?

11:43AM 5 MR. SCHENK: YES.

11:43AM 6 MAY I?

11:43AM 7 PROSPECTIVE JUROR: YES.

11:43AM 8 MR. SCHENK: THANK YOU FOR COMING BACK TODAY AND

11:43AM 9 YOUR CANDOR.

11:43AM 10 YOU HAVE EXPRESSED A THOUGHT ABOUT YOUR ABILITY TO KEEP

11:43AM 11 CERTAIN THINGS OUT OF YOUR MIND IF YOU WERE A JUROR IN THIS

11:43AM 12 CASE, AND I JUST WANT TO MAKE SURE THAT I UNDERSTAND WHICH

11:43AM 13 THOUGHTS IT IS THAT YOU WONDER WHETHER YOU COULD KEEP OUT OF

11:43AM 14 YOUR MIND.

11:43AM 15 IT SEEMS LIKE WE'RE TALKING ABOUT TWO THINGS. ONE, YOU

11:43AM 16 DESCRIBED WHEN SPOUSES WORK AT A COMMON EMPLOYER, IT WOULD BE

11:43AM 17 NATURAL FOR THEM TO TALK, TO COMMUNICATE, TO UNDERSTAND.

11:43AM 18 AND I'M WONDERING IF IT'S YOUR EXPERIENCE IN THAT AREA

11:43AM 19 THAT YOU WOULD HAVE TROUBLE KEEPING OUT OF YOUR MIND, OR IS IT

11:43AM 20 THE VERDICT IN THE HOLMES CASE THAT YOU WOULD HAVE TROUBLE

11:43AM 21 KEEPING OUT OF YOUR MIND IF YOU WERE A JUROR IN THIS CASE?

11:43AM 22 PROSPECTIVE JUROR: I THINK THAT IS AN INTERESTING

11:43AM 23 QUESTION, BECAUSE I THINK THAT, FOR ME, ONE DOESN'T EXIST

11:43AM 24 WITHOUT THE OTHER, RIGHT?

11:43AM 25 LIKE, I COULD DEFINITELY KEEP OUT OF MY MIND, YOU KNOW,

11:43AM 1 WHAT IS SPOKEN BETWEEN SPOUSES OR SIGNIFICANT OTHERS ABOUT
11:43AM 2 WORK. THAT'S ONE SIDE.
11:43AM 3 I CAN DEFINITELY KEEP OUT OF MY MIND, LIKE, ABOUT IS
11:43AM 4 MR. BALWANI INNOCENT BEFORE PROVEN GUILTY, RIGHT?
11:43AM 5 BUT WHEN YOU TAKE THE TWO TOGETHER, THERE'S -- LIKE,
11:43AM 6 THAT'S WHERE I HAVE THE MOST TROUBLE. IT'S LIKE TO ME, THEY'RE
11:43AM 7 TIED TOGETHER ALREADY BECAUSE OF -- AND I KNOW KIND OF THE
11:43AM 8 POSITION OF EACH PERSON IN THAT COMPANY, RIGHT? AND SO NOT
11:43AM 9 ONLY AS COWORKERS, BUT AS RELATION -- SOMEONE IN A
11:43AM 10 RELATIONSHIP, LIKE, THAT COMMUNICATION IS, TO ME IN MY LIFE, IS
11:43AM 11 SUPER TIGHT.
11:43AM 12 AND SO INDIVIDUALLY I THINK, SURE, LIKE, I CAN TAKE THOSE
11:43AM 13 TWO THINGS AND COMPARTMENTALIZE AND SAY, OKAY, I COULD DO VERY
11:43AM 14 FAIR, LIKE, JUDGMENT OF IT.
11:43AM 15 WHEN YOU BRING THEM TOGETHER, IT PUTS ME IN A LITTLE BIT
11:43AM 16 OF QUESTION.
11:43AM 17 I'M NOT SAYING THAT I CAN'T DO IT. LIKE, I'M GREAT AT
11:43AM 18 FOLLOWING DIRECTIONS. BUT THERE'S JUST THAT THING THERE FOR
11:43AM 19 ME.
11:43AM 20 MR. SCHENK: THANK YOU. I APPRECIATE YOUR ANSWER.
11:43AM 21 THE COURT: ANYTHING FURTHER?
11:43AM 22 MR. SCHENK: NO. THANK YOU.
11:43AM 23 MR. COOPERSMITH: NO, THANK YOU.
11:43AM 24 THE COURT: ACTUALLY, YOU CAN STEP OUTSIDE.
11:43AM 25 ANY REASON THAT WE CAN'T ASK JUROR NUMBER 34 TO GO HOME?

11:43AM 1 PROSPECTIVE JUROR: I CAN HEAD OUT?

11:43AM 2 THE COURT: YES. HAVE A GREAT WEEKEND, AND YOU'LL

11:43AM 3 HEAR FROM THE CLERK'S OFFICE AS TO WHAT NEXT STEPS THERE ARE

11:43AM 4 FOR THIS JURY.

11:43AM 5 PROSPECTIVE JUROR: AND THE TRIAL STARTS ON TUESDAY,

11:43AM 6 SO I WOULD HEAR PROBABLY BY MONDAY?

11:43AM 7 THE COURT: I WOULD THINK SO. I WOULD THINK SO.

11:43AM 8 THAT'S OUR HOPE.

11:43AM 9 PROSPECTIVE JUROR: OKAY. GREAT. THANK YOU SO

11:43AM 10 MUCH.

11:43AM 11 THE COURT: THANK YOU.

11:43AM 12 (PROSPECTIVE JUROR NUMBER 34 IS NOT PRESENT.)

11:43AM 13 THE COURT: LET'S GO OFF THE RECORD FOR JUST A

11:43AM 14 MOMENT. THANK YOU.

11:43AM 15 (PAUSE IN PROCEEDINGS.)

11:43AM 16 THE COURT: NUMBER 10 IS NEXT.

11:43AM 17 (PROSPECTIVE JUROR NUMBER 10 IS PRESENT.)

11:43AM 18 THE COURT: LET'S GO BACK ON THE RECORD. WE'LL

11:43AM 19 BRING IN JUROR 10.

11:43AM 20 THE CLERK: JUROR 10.

11:43AM 21 THE COURT: THANK YOU.

11:43AM 22 GOOD MORNING. PLEASE BE SEATED. THANK YOU.

11:43AM 23 WE'RE ON THE RECORD WITH COUNSEL AND JUROR NUMBER 10.

11:43AM 24 THANK YOU, JUROR NUMBER 10. THANK YOU FOR COMING IN.

11:43AM 25 PROSPECTIVE JUROR: OKAY.

11:43AM 1 THE COURT: WE WANTED TO TALK WITH YOU PRIVATELY

11:43AM 2 OUTSIDE OF YOUR COLLEAGUE JURORS JUST TO FOLLOW UP ON A COUPLE

11:43AM 3 OF QUESTIONS HERE.

11:43AM 4 YOU'RE NOT IN TROUBLE. THIS IS NOT ANYTHING THAT YOU

11:43AM 5 SHOULD BE WORRIED ABOUT OR CONCERNED ABOUT. IT'S JUST SOME OF

11:43AM 6 THESE TOPICS ARE BETTER DISCUSSED PRIVATELY, OUTSIDE OF THE

11:43AM 7 PRESENCE OF OTHER JURORS SUCH THAT THERE MIGHT NOT BE ANY OTHER

11:43AM 8 INFLUENCE.

11:43AM 9 SO, MR. COOPERSMITH, DO YOU HAVE SOME QUESTIONS?

11:43AM 10 MR. COOPERSMITH: YES. THANK YOU, YOUR HONOR.

11:43AM 11 ARE YOU COMFORTABLE IF I REMOVE MY MASK?

11:43AM 12 PROSPECTIVE JUROR: PARDON ME?

11:43AM 13 MR. COOPERSMITH: ARE YOU COMFORTABLE IF I TAKE MY

11:43AM 14 MASK OFF?

11:43AM 15 PROSPECTIVE JUROR: SURE.

11:43AM 16 MR. COOPERSMITH: OKAY. THANK YOU.

11:43AM 17 FIRST OF ALL, AS JUDGE DAVILA TOLD YOU, THANK YOU FOR

11:43AM 18 COMING HERE TODAY, AND I APPRECIATE YOUR TIME.

11:43AM 19 WE JUST WANT TO TALK ABOUT THIS ISSUE THAT WE WERE JUST

11:43AM 20 TALKING ABOUT IN THE COURTROOM. AND IT SOUNDS LIKE YOU'RE

11:43AM 21 AWARE OF A ROMANTIC RELATIONSHIP BETWEEN MR. BALWANI AND

11:43AM 22 MS. HOLMES.

11:43AM 23 PROSPECTIVE JUROR: UH-HUH, YEAH. I THINK FIANCE,

11:43AM 24 RIGHT?

11:43AM 25 MR. COOPERSMITH: IS THAT WHAT YOU UNDERSTAND?

11:43AM 1 PROSPECTIVE JUROR: YES.

11:43AM 2 MR. COOPERSMITH: OKAY. ARE YOU ALSO AWARE OF THE

11:43AM 3 OUTCOME OF MS. HOLMES'S CASE?

11:43AM 4 TO PUT IT ANOTHER WAY, DO YOU KNOW WHAT HAPPENED TO

11:43AM 5 MS. HOLMES?

11:43AM 6 PROSPECTIVE JUROR: THEY ACCUSED HER OF THE FRAUD

11:43AM 7 INFORMATION.

11:43AM 8 MR. COOPERSMITH: OKAY. WHEN YOU SAY "FRAUD," WHAT

11:43AM 9 DO YOU MEAN BY THAT?

11:43AM 10 PROSPECTIVE JUROR: AT FIRST SHE CREATED A COMPANY

11:43AM 11 AND THEY SAID THEY HAVE A MACHINE TO HAVE A BLOOD TEST FOR A

11:43AM 12 TEST FOR THE CANCER, AND THEN THEY SAY IT'S NOT TRUE BECAUSE --

11:43AM 13 YEAH, THEY ASK FOR A LOT OF MONEY FROM THE INVESTORS, AND THEN

11:43AM 14 THE OTHER SHAREHOLDERS.

11:43AM 15 MR. COOPERSMITH: OKAY.

11:43AM 16 ARE YOU AWARE OF MS. HOLMES HAVING A SEPARATE TRIAL?

11:43AM 17 PROSPECTIVE JUROR: NO. I THINK THEY'RE TOGETHER.

11:43AM 18 MR. COOPERSMITH: OKAY. YOU THINK MS. HOLMES IS

11:43AM 19 GOING TO BE AT THIS TRIAL?

11:43AM 20 PROSPECTIVE JUROR: YEAH, I THINK SO. THEY GO

11:43AM 21 TOGETHER.

11:43AM 22 MR. COOPERSMITH: OKAY. THANK YOU FOR THAT.

11:43AM 23 SO LET'S TALK ABOUT THE RELATIONSHIP. WHAT DO YOU KNOW

11:43AM 24 ABOUT THE RELATIONSHIP BETWEEN MS. HOLMES AND MR. BALWANI IN

11:43AM 25 TERMS OF THE ROMANTIC RELATIONSHIP? WHAT DO YOU KNOW ABOUT

11:43AM 1 THAT?

11:43AM 2 PROSPECTIVE JUROR: WELL, MY HUSBAND TOLD ME,

11:43AM 3 BECAUSE WE KNOW THIS CASE BACK TO A FEW YEARS AGO, YEAH. AND

11:43AM 4 MY FAMILY TALKED ABOUT IT. AND THEN MY HUSBAND JUST TOLD ME,

11:43AM 5 TOLD ME THEY ARE LOVERS, THEY ARE FIANCE.

11:43AM 6 MR. COOPERSMITH: OKAY. AND ARE YOU AWARE OF ANY

11:43AM 7 DIFFICULTIES OF ANY SORT IN THE RELATIONSHIP BETWEEN

11:43AM 8 MR. BALWANI AND MS. HOLMES?

11:43AM 9 PROSPECTIVE JUROR: NO, I DON'T.

11:43AM 10 MR. COOPERSMITH: OKAY.

11:43AM 11 PROSPECTIVE JUROR: DO THEY HAVE A KID?

11:43AM 12 MR. COOPERSMITH: YOU KNOW, I WISH I COULD ANSWER

11:43AM 13 YOUR QUESTIONS, BUT I CAN'T REALLY TELL YOU.

11:43AM 14 PROSPECTIVE JUROR: OKAY.

11:43AM 15 MR. COOPERSMITH: RIGHT.

11:43AM 16 PROSPECTIVE JUROR: BUT I HEARD.

11:43AM 17 MR. COOPERSMITH: ALL RIGHT. IS THAT WHAT YOU

11:43AM 18 UNDERSTAND?

11:43AM 19 PROSPECTIVE JUROR: UH-HUH.

11:43AM 20 MR. COOPERSMITH: OKAY.

11:43AM 21 NOW, YOU USED THE WORD "FRAUD."

11:43AM 22 DO YOU THINK, IF YOU WERE SEATED AS A JUROR IN THIS CASE,

11:43AM 23 COULD YOU PUT YOUR KNOWLEDGE OR OPINION ABOUT FRAUD OUT OF YOUR

11:43AM 24 MIND AND JUST FOCUS ON THE EVIDENCE IN THE CASE? BECAUSE

11:43AM 25 THAT'S WHAT JUDGE DAVILA WOULD TELL EVERY JUROR THAT THEY WOULD

11:43AM 1 HAVE TO DO, AND I'M JUST WONDERING IF YOU'RE CAPABLE OF DOING

11:43AM 2 THAT?

11:43AM 3 PROSPECTIVE JUROR: TO BE HONEST --

11:43AM 4 MR. COOPERSMITH: YES, THAT'S WHAT WE WANT.

11:43AM 5 PROSPECTIVE JUROR: I DON'T KNOW. BECAUSE THE FIRST

11:43AM 6 TIME WHEN I SAW ELIZABETH HOLMES, I JUST DON'T FEEL

11:43AM 7 COMFORTABLE. I JUST THINK SHE'S LYING.

11:43AM 8 MR. COOPERSMITH: OKAY.

11:43AM 9 PROSPECTIVE JUROR: JUST FROM MY INSTINCT, I JUST

11:43AM 10 FEEL LIKE THAT.

11:43AM 11 YEAH, AT THAT TIME SHE HAS NO TRIAL CASE, RIGHT? AT THAT

11:43AM 12 TIME EVERYBODY SAYS, SHE'S SO GOOD. I THINK IT WAS 2013 OR

11:43AM 13 2015.

11:43AM 14 MR. COOPERSMITH: OKAY.

11:43AM 15 PROSPECTIVE JUROR: SO I JUST DON'T SAY WHAT SHE

11:43AM 16 SAYS IS TRUE.

11:43AM 17 MR. COOPERSMITH: OKAY. AND SINCE YOU DON'T BELIEVE

11:43AM 18 MS. HOLMES OR YOU --

11:43AM 19 PROSPECTIVE JUROR: YEAH.

11:43AM 20 MR. COOPERSMITH: -- HOW DOES THAT AFFECT YOUR

11:43AM 21 BELIEF ABOUT MR. BALWANI?

11:43AM 22 PROSPECTIVE JUROR: BECAUSE THEY ARE LOVERS. HE'S

11:43AM 23 HER FIANCÉ. I THINK THEY HAVE A KID.

11:43AM 24 MR. COOPERSMITH: OKAY. AND DO YOU THINK THAT YOU

11:43AM 25 COULD JUST PUT OUT OF YOUR MIND ANYTHING ABOUT THAT AND JUST

11:43AM 1 FOCUS ON THE EVIDENCE THAT IS PRESENTED IN THE COURTROOM AND
11:43AM 2 ONLY USE THAT EVIDENCE TO DECIDE ABOUT MR. BALWANI'S GUILT OR
11:43AM 3 INNOCENCE?
11:43AM 4 PROSPECTIVE JUROR: THAT'S WHY I SAY I DON'T KNOW.
11:43AM 5 MR. COOPERSMITH: YOU DON'T KNOW?
11:43AM 6 PROSPECTIVE JUROR: BECAUSE I REALLY THINK THAT THEY
11:43AM 7 ARE GUILTY TO BE HONEST WITH YOU.
11:43AM 8 MR. COOPERSMITH: THAT'S ALL WE WANT. THERE'S NO
11:43AM 9 WRONG ANSWERS. WE JUST APPRECIATE YOUR HONESTY.
11:43AM 10 YOUR HONOR, THAT'S ALL OF THE QUESTIONS I HAVE.
11:43AM 11 THE COURT: OKAY. MR. SCHENK, ANYTHING?
11:43AM 12 MR. SCHENK: NO. THANK YOU.
11:43AM 13 THE COURT: THAT'S ALL. SO YOU CAN LEAVE TODAY AND
11:43AM 14 THE COURT WILL NOTIFY YOU IF YOU NEED TO COME BACK.
11:43AM 15 PROSPECTIVE JUROR: OKAY.
11:43AM 16 BY THE WAY, I JUST NOTICE THAT MY SON'S GRADUATION DATE IS
11:43AM 17 JUNE 13TH.
11:43AM 18 THE COURT: JUNE 13TH?
11:43AM 19 PROSPECTIVE JUROR: IT'S FOR THE BUSINESS
11:43AM 20 DEPARTMENT, AND JUNE 15TH FOR THE WHOLE SCHOOL.
11:43AM 21 THE COURT: OH, SO THE BUSINESS GOES FIRST?
11:43AM 22 PROSPECTIVE JUROR: YEAH. SO I DON'T KNOW IF I'M
11:43AM 23 SELECTED TO BE A JUROR, CAN I BE EXCUSED FOR A FEW DAYS OR
11:43AM 24 WHAT?
11:43AM 25 THE COURT: THANK YOU FOR LETTING ME KNOW THAT.

11:43AM 1 JUNE 13TH YOU SAID?

11:43AM 2 PROSPECTIVE JUROR: AND 15TH IS THE WHOLE SCHOOL.

11:43AM 3 THE COURT: RIGHT. IS HE GOING TO STAY -- ARE YOU

11:43AM 4 PLANNING ON STAYING FOR THE WHOLE SCHOOL AS WELL?

11:43AM 5 PROSPECTIVE JUROR: YES. AND TO BE HONEST WITH YOU,

11:43AM 6 WE HAVE NOT SEEN OUR PARENTS FOR THREE YEARS BECAUSE OF COVID.

11:43AM 7 OUR PLAN IS AFTER HIS GRADUATION DAY WE'LL GO TO CANADA.

11:43AM 8 THE COURT: OH.

11:43AM 9 PROSPECTIVE JUROR: BUT I DON'T KNOW IF THE CASE

11:43AM 10 WILL LAST FOR HOW LONG, BECAUSE IT'S THE ONLY TIME THAT WE CAN

11:43AM 11 GO IS IN JUNE, THE END OF JUNE OR JULY.

11:43AM 12 THE COURT: OKAY. ALL RIGHT.

11:43AM 13 PROSPECTIVE JUROR: THANK YOU.

11:43AM 14 THE COURT: CONGRATULATIONS.

11:43AM 15 PROSPECTIVE JUROR: THANK YOU. HAVE A GOOD WEEKEND.

11:43AM 16 THE COURT: YOU AS WELL.

11:43AM 17 MR. SCHENK: THANK YOU.

11:43AM 18 MR. COOPERSMITH: THANK YOU.

11:43AM 19 PROSPECTIVE JUROR: OKAY. BYE.

11:43AM 20 (PROSPECTIVE JUROR NUMBER 10 IS NOT PRESENT.)

11:43AM 21 THE COURT: DO WE WANT TO HAVE DISCUSSION ABOUT

11:43AM 22 JURORS HERE OR ON THE RECORD THERE? I'M HAPPY TO --

11:43AM 23 MR. SCHENK: NO PREFERENCE.

11:43AM 24 THE COURT: WHY DON'T WE TALK ABOUT -- JUROR 10.

11:43AM 25 ANY THOUGHTS ABOUT JUROR 10?

11:43AM 1 WE'RE BACK ON THE RECORD OUTSIDE OF JUROR 10 AND JUST
11:43AM 2 COUNSEL.

11:43AM 3 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

11:43AM 4 MAYBE IT'S HELPFUL TO TALK A MINUTE AS THEY COME HERE.

11:43AM 5 FOR BOTH THE TWO JURORS WE SAW, NUMBER 10 AND 34, WE THINK THEY

11:43AM 6 NEED TO BE STRUCK BASED ON THEIR ANSWERS.

11:43AM 7 MR. SCHENK: YOUR HONOR, NUMBER 10 THE GOVERNMENT

11:43AM 8 AGREES SHE SAID I REALLY THINK THEY'RE GUILTY, AND IT SEEMS

11:43AM 9 SHE'S REACHED A CONCLUSION BASED ON THE STATE OF THE EVIDENCE

11:43AM 10 AND NOT JUST BASED ON HER THOUGHTS.

11:43AM 11 AND FOR NUMBER 34 I TRIED TO DRILL DOWN ON WHETHER HIS

11:43AM 12 KNOWLEDGE, THAT HE WOULD CARRY FORWARD WAS KNOWLEDGE OF THE WAY

11:43AM 13 IN HIS EXPERIENCE RELATIONSHIPS WORK, WHICH I THINK IS

11:43AM 14 COMPLETELY APPROPRIATE FOR A JUROR TO BRING INTO A DELIBERATION

11:43AM 15 ROOM VERSUS THE CONVICTION ON MS. HOLMES BEING IMPUTED TO

11:43AM 16 MR. BALWANI BASED ON THE RELATIONSHIP, AND I THINK THAT THE

11:43AM 17 ANSWER HE GAVE DOES PROVIDE THE GOVERNMENT A LITTLE BIT OF A

11:43AM 18 CONCERN THAT HE'S GOING TO FIND OR AT LEAST BEGIN THE TRIAL

11:43AM 19 THINKING THAT MR. BALWANI IS GUILTY BECAUSE OF THE WAY

11:43AM 20 RELATIONSHIPS WORK IN HIS MIND AND THE KNOWLEDGE OF THE

11:43AM 21 CONVICTION. I THINK YOU REALLY WOULD HAVE TO SEPARATE THE TWO

11:43AM 22 IN A WAY THAT I'M NOT SURE THAT HE COULD OR WAS HONEST WITH US

11:43AM 23 AND SAID HE HAD CONCERNS THAT HE COULD.

11:43AM 24 SO FOR THAT REASON THE GOVERNMENT WOULD ALSO AGREE TO

11:43AM 25 EXCUSE 34.

11:43AM 1 THE COURT: ANY OBJECTION?

11:43AM 2 MR. COOPERSMITH: NO, YOUR HONOR.

11:43AM 3 THE COURT: ALL RIGHT. 34 IS EXCUSED. I HAD

11:43AM 4 SIMILAR OBSERVATIONS AND NOTES.

11:43AM 5 SO 34 IS EXCUSED FOR CAUSE AS WELL.

11:43AM 6 SO 10 AND 34.

11:43AM 7 THE CLERK: WOULD YOU LIKE 80?

11:43AM 8 THE COURT: NEXT IS -- IS IT 80? YES.

11:43AM 9 THE CLERK: OKAY.

11:43AM 10 (PROSPECTIVE JUROR NUMBER 80 IS PRESENT.)

11:43AM 11 THE COURT: GOOD MORNING.

11:43AM 12 PROSPECTIVE JUROR: GOOD MORNING.

11:43AM 13 THE COURT: PLEASE HAVE A SEAT. THANK YOU FOR

11:43AM 14 MEETING WITH US THIS MORNING.

11:43AM 15 WE JUST WANTED TO FOLLOW UP ON A COUPLE OF THE QUESTIONS

11:43AM 16 THAT YOU WERE ASKED OUTSIDE, AND WE WANTED TO DO THIS OUTSIDE

11:43AM 17 OF THE PRESENCE OF OTHER JURORS SO WE COULD HAVE A PRIVATE

11:43AM 18 CONVERSATION ABOUT THAT.

11:43AM 19 MR. COOPERSMITH.

11:43AM 20 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

11:43AM 21 ARE YOU COMFORTABLE IF I REMOVE MY MASK, SIR?

11:43AM 22 PROSPECTIVE JUROR: IT'S UP TO YOU.

11:43AM 23 MR. COOPERSMITH: IT'S UP TO ME?

11:43AM 24 I'LL LEAVE IT ON. IT SOUNDS LIKE YOU MAY BE MORE

11:43AM 25 COMFORTABLE THAT WAY.

11:43AM 1 PROSPECTIVE JUROR: IT'S OKAY. YOU CAN TAKE IT OFF.

11:43AM 2 MR. COOPERSMITH: ARE YOU SURE?

11:43AM 3 PROSPECTIVE JUROR: YES.

11:43AM 4 MR. COOPERSMITH: THANK YOU. IT'S HARD TO TALK WITH

11:43AM 5 THE MASK.

11:43AM 6 SO, FIRST OF ALL, THANK YOU FOR YOUR TIME, AND I

11:43AM 7 APPRECIATE YOU TAKING EVEN MORE TIME TODAY AND COMING BACK

11:43AM 8 HERE.

11:43AM 9 AS I SAID IN THE COURTROOM, THERE'S NO WRONG OR RIGHT

11:43AM 10 ANSWER, AND WE'RE TRYING TO GET WHAT PEOPLE REALLY THINK, AND

11:43AM 11 YOU'RE ENTITLED TO THINK WHATEVER YOU WANT, WE JUST WANT TO

11:43AM 12 MAKE SURE WE KNOW WHAT THAT IS.

11:43AM 13 PROSPECTIVE JUROR: OKAY.

11:43AM 14 MR. COOPERSMITH: SO MY FIRST QUESTION IS THAT IT

11:43AM 15 SOUNDS LIKE YOU'RE AWARE OF A ROMANTIC RELATIONSHIP BETWEEN

11:43AM 16 MS. HOLMES AND MR. BALWANI?

11:43AM 17 PROSPECTIVE JUROR: YES, I HEARD THE NEWS, BUT I

11:43AM 18 DIDN'T READ THE DETAIL.

11:43AM 19 MR. COOPERSMITH: OKAY. ARE YOU ALSO AWARE OF THE

11:43AM 20 OUTCOME OF MS. HOLMES'S SEPARATE CASE?

11:43AM 21 PROSPECTIVE JUROR: NO. I DON'T PAY MUCH ATTENTION,

11:43AM 22 BUT I KNOW THERE'S SOMETHING GOING ON, BUT IT'S NOT.

11:43AM 23 MR. COOPERSMITH: OKAY. WHEN YOU SAY, "THERE'S

11:43AM 24 SOMETHING GOING ON," WHAT DO YOU THINK SOMETHING IS GOING ON?

11:43AM 25 PROSPECTIVE JUROR: LIKE THERE'S A TRIAL, AND IT'S

11:43AM 1 STILL GOING ON.

11:43AM 2 MR. COOPERSMITH: DO YOU KNOW WHAT HAPPENED TO THAT

11:43AM 3 TRIAL?

11:43AM 4 PROSPECTIVE JUROR: THE PREVIOUS ONE?

11:43AM 5 MR. COOPERSMITH: RIGHT.

11:43AM 6 PROSPECTIVE JUROR: I DON'T KNOW.

11:43AM 7 MR. COOPERSMITH: YOU DON'T KNOW?

11:43AM 8 PROSPECTIVE JUROR: IN MY MIND I THINK IT'S NOT

11:43AM 9 FINISHED.

11:43AM 10 MR. COOPERSMITH: OKAY. THANK YOU.

11:43AM 11 AND WITH REGARD TO THE RELATIONSHIP, WHAT DO YOU KNOW

11:43AM 12 ABOUT THE RELATIONSHIP BETWEEN MR. BALWANI AND MS. HOLMES?

11:43AM 13 PROSPECTIVE JUROR: I DON'T KNOW THE DETAILS, BUT I

11:43AM 14 KNOW THEY HAVE SOME RELATIONSHIP; THAT THEY HAVE FUN TIME

11:43AM 15 TOGETHER ON THE WEEKEND OR ON VACATION, OR SOMETHING LIKE THAT.

11:43AM 16 MR. COOPERSMITH: OKAY. AND DO YOU KNOW OF ANYTHING

11:43AM 17 ABOUT THAT RELATIONSHIP THAT YOU THINK WOULD AFFECT YOUR

11:43AM 18 ABILITY TO BE FAIR OR ANYTHING LIKE THAT?

11:43AM 19 PROSPECTIVE JUROR: I'LL BE FAIR BECAUSE I THINK

11:43AM 20 THAT THIS IS JUST THE NEWS.

11:43AM 21 I DON'T THINK THIS IS SETTLED BECAUSE IF SOMEBODY SAYS

11:43AM 22 THIS AND SOMEBODY SAYS THAT, I THINK AS A JURY WE NEED TO KNOW

11:43AM 23 ALL OF THE DETAILS, AND FOR ME I DON'T KNOW ANY DETAILS.

11:43AM 24 I JUST BRIEFLY HEARD OF THE THING.

11:43AM 25 MR. COOPERSMITH: OKAY. AND IS THERE ANYTHING THAT

11:43AM 1 YOU'VE LEARNED ABOUT THIS CASE THAT WOULD MAKE YOU LOOK AT
11:43AM 2 MR. BALWANI AS ANYTHING OTHER THAN PRESUMED INNOCENT?
11:43AM 3 PROSPECTIVE JUROR: I THINK AT THIS STAGE I DON'T
11:43AM 4 KNOW THE DETAILS. I DON'T KNOW THE CONCRETE EVIDENCE. I DON'T
11:43AM 5 KNOW LIKE THE BEYOND A REASONABLE DOUBT. I DON'T KNOW WHAT IS
11:43AM 6 A REASONABLE, THE STANDARDS, HOW IS IT REASONABLE AND WHAT IS
11:43AM 7 NOT REASONABLE.
11:43AM 8 SO I THINK THERE'S TOO MANY THINGS TO LEARN AND STUDY IN
11:43AM 9 THIS CASE. IT'S TOO EARLY.
11:43AM 10 MR. COOPERSMITH: THANK YOU, SIR. I APPRECIATE YOUR
11:43AM 11 ANSWERS AND THAT'S HELPFUL, AND THAT'S WHAT THIS PROCESS IS
11:43AM 12 ABOUT.
11:43AM 13 SO THANK YOU.
11:43AM 14 I DON'T HAVE ANYTHING FURTHER, YOUR HONOR.
11:43AM 15 THE COURT: MR. SCHENK?
11:43AM 16 MR. SCHENK: NO, YOUR HONOR. THANK YOU.
11:43AM 17 THE COURT: THANK YOU, SIR.
11:43AM 18 THE COURT WILL LET YOU GO TODAY, AND THE COURT WILL LET
11:43AM 19 YOU KNOW IF AND WHEN YOU CAN COME BACK.
11:43AM 20 PROSPECTIVE JUROR: THANK YOU VERY MUCH.
11:43AM 21 THE COURT: THANK YOU.
11:43AM 22 (PROSPECTIVE JUROR NUMBER 80 IS NOT PRESENT.)
11:43AM 23 THE COURT: THE RECORD SHOULD REFLECT THAT NUMBER 80
11:43AM 24 HAS LEFT.
11:43AM 25 MR. COOPERSMITH: WE'RE NOT MOVING TO STRIKE NUMBER

11:43AM 1 80 AT THIS TIME.

11:43AM 2 MR. SCHENK: WE AGREE THERE'S NOT A BASIS.

11:43AM 3 THE COURT: ALL RIGHT. 82.

11:43AM 4 THE CLERK: IS HE JUST RELEASED OR HAVE WE EXCUSED

11:43AM 5 HIM?

11:43AM 6 THE COURT: HE'S JUST RELEASED AND NOT EXCUSED.

11:43AM 7 HE'S SUBJECT TO RECALL.

11:43AM 8 THE CLERK: OKAY. 82?

11:43AM 9 THE COURT: YES.

11:43AM 10 (PROSPECTIVE JUROR NUMBER 82 IS PRESENT.)

11:43AM 11 THE COURT: GOOD MORNING.

11:43AM 12 PROSPECTIVE JUROR: GOOD MORNING.

11:43AM 13 THE COURT: PLEASE HAVE A SEAT.

11:43AM 14 THANK YOU FOR YOUR PATIENCE. APOLOGIZE ON BEHALF OF THE

11:43AM 15 COURT AND THE LAWYERS FOR BRINGING YOU BACK. IT WILL BE VERY

11:43AM 16 BRIEF AS YOU'VE SEEN.

11:43AM 17 WE'VE BROUGHT YOU BACK HERE BECAUSE WE WANTED TO FOLLOW UP

11:43AM 18 ON SOME QUESTIONS ABOUT YOUR ANSWER REGARDING THE RELATIONSHIP

11:43AM 19 HERE, AND COUNSEL WILL ASK YOU THOSE QUESTIONS.

11:43AM 20 WE'RE DOING THIS PRIVATELY BECAUSE WE WANT TO MAKE SURE

11:43AM 21 THAT THERE'S -- WHAT WE SAY IS NOT HEARD BY OTHERS OR SUCH THAT

11:43AM 22 IT COULD IN ANY WAY IMPACT THE STATEMENTS AND COMMENTS OF SOME

11:43AM 23 OF YOUR OTHER JURORS, YOUR COLLEAGUE JURORS.

11:43AM 24 PROSPECTIVE JUROR: OKAY.

11:43AM 25 THE COURT: SO THAT'S WHAT WE'RE DOING HERE.

11:43AM 1 MR. COOPERSMITH IS GOING TO START.

11:43AM 2 CAN HE TAKE HIS MASK OFF?

11:43AM 3 PROSPECTIVE JUROR: SURE.

11:43AM 4 THE COURT: ARE YOU COMFORTABLE WITH THAT? IS THAT

11:43AM 5 OKAY?

11:43AM 6 PROSPECTIVE JUROR: THAT'S FINE.

11:43AM 7 THE COURT: MR. COOPERSMITH.

11:43AM 8 MR. COOPERSMITH: THANK YOU.

11:43AM 9 AS JUDGE DAVILA SAID, THANK YOU FOR COMING HERE. WE

11:43AM 10 APPRECIATE IT. WE'RE TRYING TO UNDERSTAND WHO ARE THE RIGHT

11:43AM 11 JURORS FOR THIS CASE.

11:43AM 12 PROSPECTIVE JUROR: OKAY.

11:43AM 13 MR. COOPERSMITH: IT DOESN'T SAY ANYTHING ABOUT YOU.

11:43AM 14 AND AS YOU WERE HEARING OUTSIDE IN THE COURTROOM WITH

11:43AM 15 EVERYBODY, I'M INTERESTED IN PARTICULAR ABOUT THE RELATIONSHIP

11:43AM 16 WITH MR. BALWANI AND MS. HOLMES, AND IT SOUNDS LIKE YOU KNOW

11:43AM 17 SOMETHING ABOUT THAT?

11:43AM 18 PROSPECTIVE JUROR: I JUST HEARD THAT SHE ALLEGED

11:43AM 19 ABUSE.

11:43AM 20 MR. COOPERSMITH: OKAY. AND ANY MORE SPECIFICS

11:43AM 21 ABOUT WHAT SHE ALLEGED?

11:43AM 22 PROSPECTIVE JUROR: NO, I DID NOT FOLLOW THAT TRIAL

11:43AM 23 WHATSOEVER. I JUST KNOW SHE ALLEGED THAT.

11:43AM 24 MR. COOPERSMITH: OKAY. DO YOU HAVE ANY

11:43AM 25 UNDERSTANDING OF, LIKE, WHY SHE ALLEGED THAT OR WHEN SHE

11:43AM 1 ALLEGED THAT?

11:43AM 2 PROSPECTIVE JUROR: I DON'T KNOW THE TIMELINE OF

11:43AM 3 THAT CASE. I DIDN'T FOLLOW IT CLOSELY.

11:43AM 4 I KNOW IT'S GOING TO BE PORTRAYED IN THE HULU SHOW.

11:43AM 5 THAT'S KIND OF THE EXTENT OF IT.

11:43AM 6 MR. COOPERSMITH: OKAY. DO YOU KNOW WHAT THE

11:43AM 7 OUTCOME OF THE OTHER CASE WAS?

11:43AM 8 PROSPECTIVE JUROR: NO IDEA.

11:43AM 9 MR. COOPERSMITH: YOU DON'T KNOW WHAT HAPPENED?

11:43AM 10 PROSPECTIVE JUROR: HUH-UH.

11:43AM 11 MR. COOPERSMITH: OKAY. WITH REGARD TO THE ABUSE

11:43AM 12 ALLEGATION, DO YOU HAVE ANY REASON TO BELIEVE ONE WAY OR

11:43AM 13 ANOTHER WHETHER THAT ALLEGATION IS TRUE?

11:43AM 14 PROSPECTIVE JUROR: NO. I DIDN'T FOLLOW UP ON THAT

11:43AM 15 CASE. I DON'T KNOW THE DETAILS SURROUNDING IT, SO I COULDN'T

11:43AM 16 MAKE A JUDGMENT CALL ON IT.

11:43AM 17 MR. COOPERSMITH: IS THERE ANYTHING ABOUT YOU, YOUR

11:43AM 18 KNOWLEDGE, YOUR WORK, YOUR BACKGROUND THAT WOULD MAKE YOU

11:43AM 19 BELIEVE A WOMAN WHO CLAIMS THAT A MAN ABUSED HER ONE WAY OR THE

11:43AM 20 OTHER?

11:43AM 21 PROSPECTIVE JUROR: WELL, I HAVE A BACKGROUND IN

11:43AM 22 JOURNALISM SO MY TRAINING BASICALLY -- I MEAN, NO. IF I DON'T

11:43AM 23 HAVE THE FACTS OR SOMETHING HAS BEEN PROVEN IN COURT, I DON'T

11:43AM 24 REALLY HOLD THAT IN ANY WAY.

11:43AM 25 MR. COOPERSMITH: OKAY.

11:43AM 1 AND IF YOU WERE SITTING AT TRIAL AND YOU WERE, YOU KNOW,

11:43AM 2 EVERY DAY, DAY AFTER DAY FOR SOME MONTHS, UNFORTUNATELY, YOU

11:43AM 3 WOULD BE LOOKING AT MR. BALWANI WHO IS SITTING AT COUNSEL

11:43AM 4 TABLE, WOULD YOU BE LOOKING AT HIM AS AN ALLEGED ABUSER OR AS A

11:43AM 5 PERSON WHO IS PRESUMED INNOCENT?

11:43AM 6 PROSPECTIVE JUROR: NOT AS AN ABUSER. JUST AS A

11:43AM 7 PERSON WHO IS PRESUMED INNOCENT UNTIL PROVEN GUILTY.

11:43AM 8 MR. COOPERSMITH: COULD YOU PUT OUT OF YOUR MIND

11:43AM 9 LIKE THE ALLEGATION OF ABUSE HAS ANY RELEVANCE? COULD YOU PUT

11:43AM 10 IT OUT OF YOUR MIND THAT THAT EVEN HAPPENED?

11:43AM 11 PROSPECTIVE JUROR: DEFINITELY, BECAUSE I DON'T KNOW

11:43AM 12 THE CIRCUMSTANCES.

11:43AM 13 MR. COOPERSMITH: OKAY. AND YOU THINK WITHOUT THE

11:43AM 14 CIRCUMSTANCES IT WOULD BE UNFAIR TO HOLD THAT AGAINST

11:43AM 15 MR. BALWANI?

11:43AM 16 PROSPECTIVE JUROR: YES.

11:43AM 17 MR. COOPERSMITH: ANYTHING WE SHOULD KNOW? ANYTHING

11:43AM 18 ELSE WE SHOULD KNOW IN TERMS OF YOUR ABILITY TO BE FAIR AND

11:43AM 19 IMPARTIAL AS A JUROR?

11:43AM 20 PROSPECTIVE JUROR: NO.

11:43AM 21 MR. COOPERSMITH: THAT'S ALL OF THE QUESTIONS I

11:43AM 22 HAVE.

11:43AM 23 MR. SCHENK: NO, THANK YOU.

11:43AM 24 THE COURT: YOU CAN LEAVE FOR THE DAY. YOU'LL BE

11:43AM 25 NOTIFIED WHETHER YOU WILL BE NEEDED. HAVE A GREAT WEEKEND.

11:43AM 1 PROSPECTIVE JUROR: THANK YOU. YOU TOO.

11:43AM 2 (PROSPECTIVE JUROR NUMBER 82 IS NOT PRESENT.)

11:43AM 3 THE COURT: MR. COOPERSMITH.

11:43AM 4 MR. COOPERSMITH: SHE ANSWERED THE QUESTIONS VERY

11:43AM 5 WELL AND SHE CLEARLY SAID THAT SHE'S NOT GOING TO HOLD THAT

11:43AM 6 AGAINST -- I'M SORRY.

11:43AM 7 SHE CLEARLY SAID SHE'S NOT GOING TO HOLD THAT AGAINST

11:43AM 8 MR. BALWANI. THAT'S ALL POSITIVE AND ORDINARILY I WOULD NOT BE

11:43AM 9 MOVING.

11:43AM 10 THE ISSUE, THOUGH, IS THAT I JUST THINK THAT GIVEN THE

11:43AM 11 SITUATION HERE, HAVING A JUROR COMING INTO THE CASE KNOWING

11:43AM 12 ABOUT THAT WHEN WE HAVE OTHER JURORS, PLENTY OF OTHER JURORS

11:43AM 13 WHO DON'T KNOW IS I THINK A DANGEROUS THING BECAUSE, AS I SAID

11:43AM 14 IN COURT, THAT WAS THE WHOLE REASON FOR THE SEVERANCE.

11:43AM 15 I DO ACKNOWLEDGE, OF COURSE, THE JUROR'S ANSWERS AND, YOU

11:43AM 16 KNOW, WE ALL HEARD WHAT HAPPENED. SO THAT'S WHAT WE THINK

11:43AM 17 ABOUT THAT.

11:43AM 18 THE COURT: ARE YOU EXERCISING A CAUSE CHALLENGE?

11:43AM 19 MR. COOPERSMITH: YES, JUST BECAUSE WE DON'T THINK

11:43AM 20 KNOWLEDGE OF ABUSE SHOULD COME INTO THE CASE, BUT I DO

11:43AM 21 UNDERSTAND THE COUNTERING ARGUMENT.

11:43AM 22 MR. SCHENK: YOUR HONOR, THE GOVERNMENT OPPOSES THAT

11:43AM 23 CHALLENGE.

11:43AM 24 SHE SAID THAT SHE HAD NO IDEA WHAT HAPPENED IN THE OTHER

11:43AM 25 TRIAL. SHE HAD NO IDEA WHETHER THE ALLEGATION, THE ABUSE

11:43AM 1 ALLEGATION WAS TRUE, HER BACKGROUND IN JOURNALISM SUGGESTED YOU
11:43AM 2 NEED FACTS IN ORDER TO REACH CONCLUSIONS, THAT SHE WOULD LOOK
11:43AM 3 AT MR. BALWANI EVERY DAY AS INNOCENT, THAT SHE COULD DEFINITELY
11:43AM 4 PUT IT OUT OF HER MIND.

11:43AM 5 SO THERE'S NO BASIS TO BELIEVE THAT THIS JUROR WOULD ENTER
11:43AM 6 THE COURTROOM WITH BIAS BASED ON HER KNOWLEDGE OF THE ABUSE
11:43AM 7 ALLEGATION.

11:43AM 8 LET ME JUST SAY A COUPLE OF WORDS. MR. COOPERSMITH HAS
11:43AM 9 MADE THE ARGUMENT REPEATEDLY TO THE COURT THAT ABUSE WAS THE
11:43AM 10 REASON FOR THE SEVERANCE. THAT'S AN OVERSTATEMENT.

11:43AM 11 THE COURT SEVERED BECAUSE DAY AFTER DAY MS. HOLMES WAS
11:43AM 12 GOING TO ACCUSE A CODEFENDANT SITTING IN THE COURTROOM OF
11:43AM 13 ABUSE, MAYBE BLAME HIM FOR THE CRIME. THAT IS A VERY DIFFERENT
11:43AM 14 THING THAN WHAT MR. COOPERSMITH IS CLAIMING WOULD NOW VIOLATE
11:43AM 15 THE WHOLE REASON THE COURT SEVERED THE TWO CASES BY ALLOWING A
11:43AM 16 JUROR WHO IS AWARE OF THE ABUSE ALLEGATIONS TO BE ON THIS JURY.

11:43AM 17 IT IS NOT THE CASE THAT THE COURT SEVER THE TWO TRIALS
11:43AM 18 BECAUSE OF A PASSING REFERENCE TO AN ABUSE AS THIS JUROR HAS
11:43AM 19 INDICATED. IT WAS ON THE CONTRARY, BECAUSE THE COURT FOUND AN
11:43AM 20 IRRECONCILABLE DIFFERENCE BETWEEN THE DEFENSES THAT WOULD BE
11:43AM 21 TRIED OR PROPOUNDED BY TWO DEFENDANTS SIMULTANEOUSLY.

11:43AM 22 EVEN THE KINDS OF CASES THAT THE DEFENSE CITED IN ITS
11:43AM 23 MOTION TO SEVER WERE NOT 403 BASED SORT OF ALLEGATIONS OR TOO
11:43AM 24 PREJUDICIAL TO BE SPOKEN. THEY WERE THE IRRECONCILABLE TRIAL
11:43AM 25 DIFFERENCES AS A BASIS TO SEVER.

11:43AM 1 SO IT IS NOT THE CASE THAT THE COURT, BY ALLOWING A JUROR
11:43AM 2 LIKE JUROR 82 TO SIT IN THIS TRIAL, WOULD BE REVERSING OR
11:43AM 3 ISSUING AN ORDER CONTRARY TO THE BASIS FOR SEVERANCE
11:43AM 4 PREVIOUSLY. THERE'S A SIGNIFICANT DISTINCTION BETWEEN ALLOWING
11:43AM 5 A JUROR LIKE 82 TO SIT IN THIS TRIAL AND THE BASIS FOR
11:43AM 6 SEVERANCE ORIGINALLY.
11:43AM 7 SO THE COURT SHOULD DENY.
11:43AM 8 THE COURT: THANK YOU.
11:43AM 9 MR. COOPERSMITH: YOUR HONOR, THE ONLY THING I WOULD
11:43AM 10 ADD IS THAT WHEN THE JURY -- WHEN THE TRIAL IS OVER AND THE
11:43AM 11 EVIDENCE IS IN AND THEN THE JURORS ARE DELIBERATING, WHAT WOULD
11:43AM 12 THE COURT DO, IF ANYTHING, TO MAKE SURE THAT IN THE COURSE OF
11:43AM 13 DELIBERATIONS A JUROR WOULDN'T SAY, WELL, YOU KNOW, I DO KNOW
11:43AM 14 THAT HE WAS ALSO ACCUSED OF ABUSE, RIGHT?
11:43AM 15 I MEAN, THERE WILL BE EVIDENCE IN THIS CASE WHERE I
11:43AM 16 CERTAINLY BELIEVE THAT THERE ARE CERTAIN EMAILS THAT
11:43AM 17 MR. BALWANI SENT THAT WERE NOT THAT NICE. HE WAS SOMETIMES A
11:43AM 18 DEMANDING BOSS. THAT EVIDENCE WILL COME IN.
11:43AM 19 TO HAVE A JUROR IN DELIBERATIONS -- WE DON'T HAVE ANY
11:43AM 20 CONTROL AT ALL WHAT THEY TALK ABOUT. IF SOMEONE WANTS TO BRING
11:43AM 21 THAT INTO THE CASE, THEN ALL OF THE OTHER JURORS WILL KNOW.
11:43AM 22 THAT'S KIND OF REALLY THE HEART OF THE REASON WHY I HAVE
11:43AM 23 CONCERN.
11:43AM 24 EVEN THOUGH I DO ACKNOWLEDGE, MR. SCHENK IS RIGHT ABOUT
11:43AM 25 THE -- AND I ACKNOWLEDGE THE ANSWER, BUT THAT'S THE CONCERN

11:43AM 1 THAT I HAVE.

11:43AM 2 THE COURT: I AGREE. IT SOUNDS LIKE WE'RE IN

11:43AM 3 AGREEMENT HERE, OR AT LEAST MADE THE OBSERVATIONS. SHE WAS

11:43AM 4 VERY FORTHRIGHT.

11:43AM 5 AND ONE THING I WILL NOTE FOR THE RECORD IS HER DEMEANOR.

11:43AM 6 SHE WAS -- HER ANSWERS WERE CRISP. THEY QUICKLY FOLLOWED YOUR

11:43AM 7 QUESTIONS, INCLUDING HER DENIALS THAT IT'S NOT GOING TO AFFECT

11:43AM 8 ME.

11:43AM 9 AND SHE SAID I'M A JOURNALIST, I NEED TO SEE EVIDENCE

11:43AM 10 BEFORE I CAN EVEN WRITE, I THINK IS WHAT SHE WAS INFERRING.

11:43AM 11 AND HERE SHE TOLD US SHE COULD PRESUME INNOCENCE, AND I

11:43AM 12 UNDERSTAND THAT.

11:43AM 13 AND I DIDN'T READ HER 2.15, BUT MY SENSE IS THAT SHE TOLD

11:43AM 14 US YESTERDAY THAT SHE WOULD FOLLOW THE INSTRUCTIONS OF THE

11:43AM 15 COURT.

11:43AM 16 2.15 WILL BE READ. AND I THINK THAT WOULD DO ABOUT AS

11:43AM 17 MUCH AS WE CAN TO ABOUT INFORMING A JURY ABOUT WHAT THEY MAY

11:43AM 18 NOT DISCUSS IN A CASE.

11:43AM 19 AND YOU'RE RIGHT, WE CAN'T GO IN THERE WITH THEM. WE'RE

11:43AM 20 NOT REFEREES WITH THEIR DISCUSSION. THEY'LL DO WHAT THEY DO

11:43AM 21 GUIDED BY THE INSTRUCTIONS AND THE PRESUMPTION IS THAT THE

11:43AM 22 JURORS FOLLOW THE INSTRUCTIONS OF THE COURT.

11:43AM 23 SO THAT'S THE PROPHYLACTIC MEASURES THAT THE COURT CAN AND

11:43AM 24 WILL TAKE IN THE CASE.

11:43AM 25 I'M GOING TO -- IF YOU'RE MAKING A REQUEST TO STRIKE HER

11:43AM 1 FOR CAUSE, I'M GOING TO RESPECTFULLY DECLINE THAT INVITATION.

11:43AM 2 I DO THINK THAT SHE ANSWERED SUCH THAT A CAUSE CHALLENGE IS

11:43AM 3 WARRANTED IF THAT WAS THE REQUEST.

11:43AM 4 MR. COOPERSMITH: THAT WAS THE QUESTION.

11:43AM 5 THE COURT: THANK YOU. 83.

11:43AM 6 (PROSPECTIVE JUROR NUMBER 83 IS PRESENT.)

11:43AM 7 THE COURT: GOOD MORNING. HAVE A SEAT.

11:43AM 8 THANK YOU FOR COMING IN THIS MORNING AND STAYING A LITTLE

11:43AM 9 BIT TODAY. WE WANTED TO FOLLOW UP WITH SOME OF THE QUESTIONS

11:43AM 10 THAT MR. COOPERSMITH MENTIONED OUTSIDE IN JUST A MOMENT AND

11:43AM 11 JUST FOLLOWING UP ON SOME OF THOSE WITH YOU HERE.

11:43AM 12 AND WE'RE SPEAKING WITH YOU PRIVATELY, OUTSIDE OF THE

11:43AM 13 PRESENCE OF THE OTHER PROSPECTIVE JURORS, SO WE DON'T HAVE THEM

11:43AM 14 LISTEN TO ANYTHING THAT MIGHT CAUSE THEM TO CHANGE AN ANSWER OR

11:43AM 15 THINK ABOUT AN ANSWER THAT IS NOT APPROPRIATE.

11:43AM 16 SO MR. COOPERSMITH IS GOING TO BEGIN BY ASKING YOU SOME

11:43AM 17 QUESTIONS.

11:43AM 18 MAY I ASK HIM TO TAKE HIS MASK OFF? DO YOU HAVE A --

11:43AM 19 PROSPECTIVE JUROR: NO, THAT'S FINE.

11:43AM 20 THE COURT: ARE YOU COMFORTABLE WITH THAT?

11:43AM 21 PROSPECTIVE JUROR: YES, THAT'S FINE.

11:43AM 22 THE COURT: MR. COOPERSMITH.

11:43AM 23 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

11:43AM 24 THANK YOU, SIR, FOR COMING BACK HERE.

11:43AM 25 PROSPECTIVE JUROR: SURE.

11:43AM 1 MR. COOPERSMITH: AND TAKING THE TIME. I APPRECIATE

11:43AM 2 THAT.

11:43AM 3 AS I SAID OUT IN THE COURTROOM, THERE'S NO WRONG ANSWERS

11:43AM 4 HERE. WE'RE TRYING TO UNDERSTAND WHAT PEOPLE THINK AND FEEL

11:43AM 5 AND TO UNDERSTAND WHO THE RIGHT JURORS WOULD BE ON THIS CASE.

11:43AM 6 I THINK YOU SAID OR RAISED YOUR HAND AT LEAST TO

11:43AM 7 ACKNOWLEDGE THAT YOU WERE AWARE OF A RELATIONSHIP BETWEEN

11:43AM 8 MR. BALWANI AND MS. HOLMES?

11:43AM 9 PROSPECTIVE JUROR: YES.

11:43AM 10 MR. COOPERSMITH: AND WHAT DO YOU KNOW ABOUT THAT?

11:43AM 11 PROSPECTIVE JUROR: ONLY THAT IT SEEMS THAT I RECALL

11:43AM 12 IN NEWSPAPER ARTICLES THAT I'VE READ MENTIONING THAT THEY HAD A

11:43AM 13 RELATIONSHIP.

11:43AM 14 MR. COOPERSMITH: DO YOU KNOW ANYTHING MORE THAN

11:43AM 15 THAT ABOUT THE RELATIONSHIP?

11:43AM 16 PROSPECTIVE JUROR: IT IMPLIED THAT IT WAS A

11:43AM 17 ROMANTIC RELATIONSHIP.

11:43AM 18 MR. COOPERSMITH: OKAY.

11:43AM 19 PROSPECTIVE JUROR: AND BEYOND THAT I REALLY DON'T

11:43AM 20 KNOW.

11:43AM 21 MR. COOPERSMITH: OKAY. AND NO OTHER KNOWLEDGE OF

11:43AM 22 HOW THE RELATIONSHIP WENT, WHETHER IT WAS SMOOTH OR DIFFICULT

11:43AM 23 OR GOOD OR BAD OR ANYTHING?

11:43AM 24 PROSPECTIVE JUROR: WELL, I UNDERSTAND IT BECAME NOT

11:43AM 25 A GOOD RELATIONSHIP.

11:43AM 1 MR. COOPERSMITH: AND WHAT DO YOU KNOW ABOUT THAT?

11:43AM 2 WHY DO YOU SAY IT DIDN'T BECOME A GOOD RELATIONSHIP?

11:43AM 3 PROSPECTIVE JUROR: WELL, I THINK IT REFERRED TO --

11:43AM 4 I RECALL BEING REFERRED TO THE RELATIONSHIP IN THE PAST TENSE.

11:43AM 5 MR. COOPERSMITH: MEANING IT'S NO LONGER A

11:43AM 6 RELATIONSHIP?

11:43AM 7 PROSPECTIVE JUROR: RIGHT.

11:43AM 8 MR. COOPERSMITH: BUT DO YOU KNOW THE REASON WHY IT

11:43AM 9 WOULD HAVE ENDED IF THAT'S WHAT HAPPENED?

11:43AM 10 PROSPECTIVE JUROR: NO.

11:43AM 11 MR. COOPERSMITH: OKAY. DO YOU KNOW ANYTHING ABOUT

11:43AM 12 THE OUTCOME OF MS. HOLMES'S CASE OR WHAT HAPPENED TO HER?

11:43AM 13 PROSPECTIVE JUROR: WELL, I UNDERSTAND SHE HAD OR

11:43AM 14 RECEIVED A NINE MONTH SENTENCE I BELIEVE IT WAS?

11:43AM 15 MR. COOPERSMITH: OKAY. THAT'S WHAT YOU HEARD?

11:43AM 16 PROSPECTIVE JUROR: THAT'S WHAT I HAVE HEARD.

11:43AM 17 MR. COOPERSMITH: OKAY. AND IS THERE ANYTHING ABOUT

11:43AM 18 THAT UNDERSTANDING THAT WOULD MAKE YOU LESS THAN FAIR AND

11:43AM 19 IMPARTIAL IN THE CASE OF MR. BALWANI?

11:43AM 20 PROSPECTIVE JUROR: WELL, ONLY TO THE EXTENT THAT, I

11:43AM 21 MEAN, I WOULD, I WOULD HAVE THE FEELING THAT THEY HAVE BEEN

11:43AM 22 SOMEHOW WORKING TOGETHER OR HAD HAD THE OPPORTUNITY TO WORK

11:43AM 23 TOGETHER ON WHATEVER IT WAS THAT SHE HAD DONE.

11:43AM 24 MR. COOPERSMITH: OKAY. SO DO YOU LINK THE TWO

11:43AM 25 THINGS, LIKE THERE WAS A ROMANTIC RELATIONSHIP ON THE ONE HAND

11:43AM 1 AND THAT YOU HAVE SOME UNDERSTANDING OF THE OUTCOME OF
11:43AM 2 MS. HOLMES'S CASE? DO YOU LINK THOSE TWO THINGS?
11:43AM 3 PROSPECTIVE JUROR: WELL, YEAH, IF THEY HAD A
11:43AM 4 RELATIONSHIP I WOULD LINK THE TWO.
11:43AM 5 MR. COOPERSMITH: HOW WOULD YOU LINK THE TWO?
11:43AM 6 PROSPECTIVE JUROR: WELL, I WOULD LINK THEM JUST
11:43AM 7 THAT TWO PEOPLE WHO WERE TOGETHER IN A ROMANTIC RELATIONSHIP,
11:43AM 8 AND ESPECIALLY IF THEY'RE INVOLVED IN THE SAME INDUSTRY AND THE
11:43AM 9 SAME BUSINESS, YOU KNOW, WOULD BE SHARING INFORMATION AND
11:43AM 10 DETAILS ABOUT WHAT WAS GOING ON.
11:43AM 11 I MEAN, IT'S HARD TO IMAGINE THAT ONE OF THEM WOULD NOT
11:43AM 12 KNOW WHAT THE OTHER ONE WAS DOING.
11:43AM 13 MR. COOPERSMITH: OKAY. IF YOU WERE SEATED AS A
11:43AM 14 JUROR, THE JUDGE WOULD INSTRUCT YOU THAT WHAT YOU KNOW ABOUT
11:43AM 15 THE OUTCOME OF MS. HOLMES'S CASE HAS NO BEARING ON THIS TRIAL.
11:43AM 16 THAT'S NOTHING SOMETHING THAT A JUROR IS SUPPOSED TO CONSIDER.
11:43AM 17 THAT YOU'RE SUPPOSED TO PUT THAT OUT OF YOUR MIND AND JUST
11:43AM 18 FOCUS ON WHETHER THE GOVERNMENT HAS MET ITS BURDEN TO PROVE
11:43AM 19 MR. BALWANI IS GUILTY BEYOND A REASONABLE DOUBT.
11:43AM 20 DO YOU THINK THAT YOU COULD PUT OUT OF YOUR MIND WHAT YOU
11:43AM 21 JUST TALKED ABOUT WITH THE RELATIONSHIP AND THE FACT THAT YOU
11:43AM 22 HAVE SOME KNOWLEDGE OF THE OUTCOME OF MS. HOLMES'S CASE, CAN
11:43AM 23 YOU PUT THAT ASIDE AND JUST GIVE MR. BALWANI A TOTALLY CLEAN
11:43AM 24 SLATE UNTIL THE GOVERNMENT IS ABLE TO, YOU KNOW, PROVE
11:43AM 25 OTHERWISE?

11:43AM 1 PROSPECTIVE JUROR: WELL, I MEAN PERSONALLY I HAVE A
11:43AM 2 PROBLEM FOCUSING. AS I MENTIONED IN THE QUESTIONNAIRE, I HAVE
11:43AM 3 PARKINSON'S DISEASE, AND IT AFFECTS, IT AFFECTS MY COGNITIVE
11:43AM 4 ABILITIES TO FOLLOW THROUGH ON A PARTICULAR THOUGHT AND FOCUS
11:43AM 5 ON THINGS.

11:43AM 6 SO, I MEAN, TO THAT EXTENT, I DON'T KNOW WHETHER IT'S
11:43AM 7 GOING TO BE -- IF I'M GOING TO BE TOTALLY ABLE TO DO THAT.

11:43AM 8 MR. COOPERSMITH: AND DO YOU THINK THAT'S PARTLY
11:43AM 9 BECAUSE OF YOUR ILLNESS, SIR?

11:43AM 10 PROSPECTIVE JUROR: WELL, IT'S JUST THAT, YOU KNOW,
11:43AM 11 I HAVE A DIFFICULTY WITH, WITH CONCENTRATING FOR SPECIFICALLY
11:43AM 12 CONTINUITY ISSUES FOLLOWING THROUGH LIKE A STORY LINE.

11:43AM 13 FOR EXAMPLE, IF I SEE A MOVIE OR READ A BOOK, I COULD
11:43AM 14 ENJOY IT IN THE MOMENT, BUT IF I TRY TO RECALL IT AFTERWARDS, I
11:43AM 15 COULDN'T TELL YOU WHAT THE PLOT IS.

11:43AM 16 IN OTHER WORDS, I GET HALF WAY THROUGH IT, AND LOSE TRACK
11:43AM 17 OF WHAT I'M --

11:43AM 18 MR. COOPERSMITH: SO JUST TO BE -- AND, FIRST OF
11:43AM 19 ALL, I'M VERY SORRY TO HEAR ABOUT YOUR ILLNESS, SIR.

11:43AM 20 PROSPECTIVE JUROR: OH, THANKS.

11:43AM 21 MR. COOPERSMITH: AND -- BUT BECAUSE OF THAT ISSUE,
11:43AM 22 IF YOU WERE TO SIT THROUGH A TRIAL THAT LASTED SEVERAL MONTHS,
11:43AM 23 AND THEN YOU WERE ASKED TO MAKE A DECISION OF MR. BALWANI BASED
11:43AM 24 ON ALL OF THE EVIDENCE THAT YOU HAVE HEARD, DO YOU HAVE ANY
11:43AM 25 DOUBT AS TO WHETHER YOU COULD RECALL AND PUT TOGETHER THE

11:43AM 1 DETAILS OF WHAT YOU HEARD IN ORDER TO, YOU KNOW, BE A JUROR WHO
11:43AM 2 COULD DELIBERATE AND REACH AN INVESTIGATION?

11:43AM 3 PROSPECTIVE JUROR: WELL, I DEFINITELY FEEL LIKE I
11:43AM 4 WOULD HAVE DIFFICULTY DOING THAT.

11:43AM 5 MR. COOPERSMITH: OKAY. OKAY. ALL RIGHT. THANK
11:43AM 6 YOU, SIR. I APPRECIATE YOUR HONESTY AND YOUR TIME.

11:43AM 7 PROSPECTIVE JUROR: OKAY.

11:43AM 8 MR. COOPERSMITH: I DON'T HAVE ANY OTHER QUESTIONS
11:43AM 9 FOR THIS JUROR.

11:43AM 10 THE COURT: MR. SCHENK.

11:43AM 11 MR. SCHENK: JUST ONE BRIEF QUESTION.

11:43AM 12 SOME JURORS DURING TRIAL DECIDE TO TAKE NOTES BECAUSE THEY
11:43AM 13 ALSO HAVE TROUBLE REMEMBERING DURING THE COURSE OF A LONG
11:43AM 14 TRIAL.

11:43AM 15 WOULD TAKING NOTES ASSIST YOU ABOUT RECALL LATER OR DO YOU
11:43AM 16 THINK THAT WOULDN'T BE A SUFFICIENT SOLUTION?

11:43AM 17 MR. COOPERSMITH: WELL, PART OF THE PROBLEM AND ONE
11:43AM 18 OF THE SYMPTOMS, PHYSICAL SYMPTOMS I HAVE IS DIFFICULTY IN
11:43AM 19 WRITING, AND I DON'T KNOW THAT I'LL BE ABLE TO TAKE NOTES
11:43AM 20 EFFECTIVELY.

11:43AM 21 THE COURT: OKAY. THANK YOU VERY MUCH.

11:43AM 22 ANYTHING FURTHER?

11:43AM 23 MR. COOPERSMITH: NOTHING FURTHER, YOUR HONOR.

11:43AM 24 THE COURT: YOU'RE ONE OF THE RARE PEOPLE WHO ARE A
11:43AM 25 NATIVE BAY AREA. I THINK YOU WERE BORN IN SAN MATEO?

11:43AM 1 PROSPECTIVE JUROR: SAN MATEO, THAT'S CORRECT.

11:43AM 2 THE COURT: DID YOU GO TO SAN MATEO HIGH?

11:43AM 3 PROSPECTIVE JUROR: NO. I ACTUALLY GREW UP IN

11:43AM 4 SAN JOSE -- ACTUALLY I GREW UP IN SARATOGA AND WENT TO PROSPECT

11:43AM 5 HIGH SCHOOL.

11:43AM 6 THE COURT: OH. YOU'RE ONE OF THE LOCALS, TRUE

11:43AM 7 LOCALS. THERE USED TO BE A LOT OF ORCHARDS WHEN YOU WERE IN

11:43AM 8 HIGH SCHOOL.

11:43AM 9 PROSPECTIVE JUROR: WHEN I WAS A KID I REMEMBER

11:43AM 10 THEM.

11:43AM 11 THE COURT: DID YOU CUT APRICOTS?

11:43AM 12 PROSPECTIVE JUROR: NO, BUT WHEN I WAS A KID I

11:43AM 13 REMEMBER EATING THEM.

11:43AM 14 (LAUGHTER.)

11:43AM 15 THE COURT: THERE WERE A LOT OF THEM.

11:43AM 16 ANY FURTHER QUESTIONS?

11:43AM 17 MR. COOPERSMITH: NO, YOUR HONOR.

11:43AM 18 THE COURT: THANK YOU FOR COMING IN. YOU'LL BE

11:43AM 19 NOTIFIED BY THE CLERK'S OFFICE WHETHER YOU WILL NEED TO COME

11:43AM 20 BACK IN. THANK YOU FOR SPENDING TIME WITH US THIS MORNING.

11:43AM 21 PROSPECTIVE JUROR: THANK YOU VERY MUCH.

11:43AM 22 (PROSPECTIVE JUROR NUMBER 83 IS NOT PRESENT.)

11:43AM 23 THE COURT: MR. COOPERSMITH.

11:43AM 24 MR. COOPERSMITH: I THINK THERE WERE TWO ISSUES WITH

11:43AM 25 JUROR NUMBER 83. ONE IS THE HARSHSHIP ISSUE.

11:43AM 1 I THINK MR. SCHENK MADE A GOOD POINT AND QUESTION ABOUT DO

11:43AM 2 YOU TAKE NOTES? AND APPARENTLY THAT'S NOT EVEN AN OPTION FOR

11:43AM 3 HIM.

11:43AM 4 THE COURT: THAT'S IN HIS QUESTIONNAIRE, HE HAS

11:43AM 5 TROUBLE WRITING.

11:43AM 6 MR. COOPERSMITH: SO BASED ON THE HARSHIP. AND

11:43AM 7 ALSO I THINK THERE WERE SOME CAUSE ISSUES PUTTING THE OUTCOME

11:43AM 8 OUT AND ESPECIALLY WHEN YOU COMBINE THE TWO THINGS. I THINK

11:43AM 9 THIS JUROR SHOULD BE EXCUSED.

11:43AM 10 MR. LEACH: THE GOVERNMENT DOESN'T OPPOSE EXCUSING

11:43AM 11 HIM FOR HARSHIP. I DON'T THINK WE NEED TO REACH THE CAUSE

11:43AM 12 ISSUE.

11:43AM 13 THE COURT: IN TALKING WITH HIM, AND THE COURT

11:43AM 14 REREAD HIS QUESTIONNAIRE, AND SEEING HIS DEMEANOR, AND I LOOKED

11:43AM 15 AT HIS WRITING, AND HE WAS VERY CANDID ABOUT HIS COGNITIVE

11:43AM 16 ABILITY TO RECALL, AND SO I'M GOING TO STRIKE HIM FOR HARSHIP.

11:43AM 17 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

11:43AM 18 THE COURT: I THINK THAT EXHAUSTS YOUR LIST FOR THE

11:43AM 19 MORNING?

11:43AM 20 MR. COOPERSMITH: THAT WAS THE LIST.

11:43AM 21 THE COURT: OKAY.

11:43AM 22 MR. COOPERSMITH: AND THEN WE STILL HAVE THE OTHER

11:43AM 23 CAUSE STRIKES FOR THE PEOPLE.

11:43AM 24 I'VE GIVEN MR. SCHENK A DOCUMENT THAT TELLS THE GOVERNMENT

11:43AM 25 WHO THAT IS, AND I HAVE A DOCUMENT FOR THE COURT AS WELL. THIS

11:43AM 1 IS WHAT I WILL BE GOING THROUGH.

11:43AM 2 THE COURT: SHOULD I RECEIVE THIS?

11:43AM 3 MR. SCHENK: YES, YOUR HONOR. I THINK IT MAY BE

11:43AM 4 HELPFUL.

11:43AM 5 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

11:43AM 6 (HANDING.)

11:43AM 7 THE COURT: SHOULD WE -- LET ME CHECK MY CALENDAR

11:43AM 8 FOR JUST A MOMENT. LET'S GO OFF THE RECORD.

11:43AM 9 (DISCUSSION OFF THE RECORD.)

11:43AM 10 THE COURT: WE'LL SEE YOU AT 1:00 O'CLOCK.

11:43AM 11 YOU KNOW WHAT, WE'LL BE IN JUDGE KOH'S COURTROOM BECAUSE

11:43AM 12 THEY'LL BE HANGING THE MURAL HERE. SO WE'LL BE MEETING

11:43AM 13 DOWNSTAIRS, I THINK; IS THAT RIGHT?

11:43AM 14 MR. COOPERSMITH: YES, WE CAN DO THAT.

11:43AM 15 I'M SORRY, YOUR HONOR.

11:43AM 16 THERE WAS A JUROR THAT YOU DEFERRED ON 126 FROM YESTERDAY.

11:43AM 17 THE COURT: NOT 12 --

11:43AM 18 MR. COOPERSMITH: SHE WAS 126.

11:43AM 19 THE COURT: 126, YES. THE CHIROPRACTOR, RIGHT?

11:43AM 20 MR. COOPERSMITH: THAT'S CORRECT.

11:43AM 21 THE COURT: I DID REVIEW THE TRANSCRIPT OF THE

11:43AM 22 COLLOQUY. I THINK IT WAS TWO PAGES OF -- AT LEAST THAT I WAS

11:43AM 23 INTERESTED IN -- REGARDING -- WHAT I FOCUSSSED ON YESTERDAY WAS

11:43AM 24 HER STATEMENTS REGARDING MORAL AND ETHICS. I WAS INTRIGUED BY

11:43AM 25 THAT.

11:43AM 1 HER OTHER COMMENTS ABOUT HER INVOLVEMENT WITH HER WORK DID
11:43AM 2 NOT TROUBLE ME. THAT IS SCHEDULING, AND SHE HAD COLLEAGUES WHO
11:43AM 3 COULD DO HER CASELOAD. SHE HAD CONCERN.
11:43AM 4 THAT, TO ME, SOUNDS LIKE, IF YOU WILL, THE NORMAL BUSINESS
11:43AM 5 DISRUPTION AND LIFE DISRUPTION THAT JURORS HAVE WHEN THEY'RE
11:43AM 6 CALLED. SO I DON'T HAVE ANY CONCERN ABOUT THAT.
11:43AM 7 MY CONCERN WAS FOCUSSSED ON HER USE OF THE WORD "ETHICS"
11:43AM 8 AND "MORALITY," AND I WANTED TO LOOK AT THAT AGAIN.
11:43AM 9 IT SEEMED TO ME THAT SHE'S EQUATING HER -- SHE TOLD US AS
11:43AM 10 A HEALTH CARE PROVIDER THAT SHE PAYS GREAT ATTENTION TO ETHICS
11:43AM 11 AND MORAL. THAT CAUSES ME CONCERN THAT IN LOOKING AT THIS
11:43AM 12 EVIDENCE SHE'S GOING TO USE THAT LENS TO PERHAPS JUDGE THE
11:43AM 13 EVIDENCE IN AN UNFAIR MANNER.
11:43AM 14 MR. COOPERSMITH: THAT WAS OUR CONCERN AS WELL.
11:43AM 15 THE COURT: SO I'M GOING TO STRIKE HER FOR CAUSE.
11:43AM 16 THANK YOU FOR LETTING ME LOOK AT THE TRANSCRIPT.
11:43AM 17 WE'LL SEE YOU AT 1:00 O'CLOCK.
11:43AM 18 MR. COOPERSMITH: THANK YOU, YOUR HONOR.
11:43AM 19 MR. SCHENK: OKAY.
11:43AM 20 (LUNCH RECESS TAKEN AT 11:43 A.M.)
21
22
23
24
25

01:05PM 1 **AFTERNOON SESSION**

01:06PM 2 (COURT CONVENED AT 1:06 P.M.)

01:06PM 3 (PROSPECTIVE JURY PANEL OUT AT 1:06 P.M.)

01:06PM 4 THE COURT: ALL RIGHT. WE'RE ON THE RECORD IN THE

01:06PM 5 BALWANI MATTER.

01:06PM 6 ALL COUNSEL PREVIOUSLY PRESENT ARE PRESENT AGAIN.

01:06PM 7 I THINK WE WERE GOING TO TALK ABOUT ADDITIONAL POTENTIAL

01:06PM 8 CHALLENGES I BELIEVE.

01:06PM 9 MR. COOPERSMITH: YES, YOUR HONOR.

01:07PM 10 THE COURT: LET ME FIX THE MICROPHONE BEFORE WE GO

01:07PM 11 ON THE RECORD, IRENE.

01:07PM 12 (DISCUSSION OFF THE RECORD.)

01:07PM 13 THE COURT: LET'S GO ON THE RECORD.

01:07PM 14 MR. COOPERSMITH, YOU HAVE SOME THOUGHTS ABOUT SOME JURORS?

01:07PM 15 MR. COOPERSMITH: YES, YOUR HONOR. THANK YOU.

01:07PM 16 AND I DON'T KNOW IF YOU STILL HAVE THE LIST, YOUR HONOR,

01:07PM 17 BUT WE GAVE A LIST OUT WHEN WE WERE IN THE DELIBERATION ROOM TO

01:08PM 18 MR. SCHENK AS WELL.

01:08PM 19 THE COURT: YES.

01:08PM 20 MR. COOPERSMITH: AND THAT'S THE LIST THAT I'M GOING

01:08PM 21 TO FOLLOW.

01:08PM 22 THE COURT: OKAY.

01:08PM 23 MR. COOPERSMITH: I HAVE A COUPLE OF OTHER QUESTIONS

01:08PM 24 BEYOND THAT, BUT LET ME JUST START WITH THAT LIST.

01:08PM 25 SO THE FIRST ITEM DISCUSSED IS HARSHIP ISSUES THAT WE

01:08PM 1 JUST WANTED TO MAKE SURE THE COURT ADDRESSED.

01:08PM 2 SO THE FIRST ONE IN THAT CATEGORY IS JUROR NUMBER 6.

01:08PM 3 WHAT WE DID HERE IS WE WENT BACK TO THE TRANSCRIPT SO WE

01:08PM 4 COULD GET EXACTLY WHAT THE RECORD WAS AND WHAT WE THOUGHT THE

01:08PM 5 ISSUE WAS.

01:08PM 6 SO ON THIS ONE THE JUROR SAID THAT "I HAVE TO WORK EARLY"

01:08PM 7 SO SHE CAN HELP HER SINGLE DAUGHTER TO WORK AFTER SHE COMES

01:08PM 8 HOME, BECAUSE SHE HAS A 97-YEAR OLD MOTHER-IN-LAW IN MY HOUSE

01:08PM 9 AND A 3-YEAR OLD TO TAKE CARE OF.

01:08PM 10 SHE SAID, IS THERE ANY ADJUSTMENT YOU CAN MAKE -- THE

01:08PM 11 COURT ASKED THE QUESTION IF THERE'S ANY ADJUSTMENT SHE CAN MAKE

01:08PM 12 TO MAKE SURE THE FAMILY IS PROVIDED FOR AND THE BABYSITTING

01:09PM 13 OCCURS AND YOU CAN ALSO BE A JUROR IN THIS CASE?

01:09PM 14 AND THE ANSWER WAS I DON'T KNOW.

01:09PM 15 SO THAT SEEMED TO BE A QUESTION. OBVIOUSLY THE COURT CAN

01:09PM 16 MAKE A DECISION ABOUT THAT, BUT I JUST WANTED TO BRING THAT TO

01:09PM 17 YOUR ATTENTION.

01:09PM 18 THE COURT: OKAY.

01:09PM 19 MR. SCHENK.

01:09PM 20 MR. SCHENK: YOUR HONOR, I THINK IT'S A CLOSE CALL.

01:09PM 21 I DON'T THINK THE RECORD IS AS GOOD OR AS CLOSE IT HAS BEEN FOR

01:09PM 22 OTHER JURORS WE HAVE EXCUSED FOR CAUSE BECAUSE OF HER "I DON'T

01:09PM 23 KNOW" ANSWER.

01:09PM 24 IF YOU LOOK AT HER QUESTIONNAIRE, IN QUESTION 1 SHE WROTE

01:09PM 25 NO TO WHETHER SHE WAS APPLYING TO BE EXCUSED ON THE BASIS OF A

01:09PM 1 SERIOUS HARDSHIP, BUT TO NUMBER 7 SHE WROTE YES.

01:09PM 2 NUMBER 7 WAS A QUESTION ABOUT THE IMPLICATIONS OF THE

01:09PM 3 COVID PANDEMIC ON THE JURY SERVICE. SHE WROTE DUE TO THE

01:09PM 4 PANDEMIC SHE HAD TO START WORK EARLY SO THAT SHE COULD TAKE

01:09PM 5 CARE OF THIS GRANDCHILD, ALLOWING HER CHILD TO WORK.

01:09PM 6 IT SEEMS, AS A RESULT, A LITTLE UNCLEAR IF, AS PANDEMIC

01:10PM 7 RESTRICTIONS LOOSEN, THIS HARDSHIP EVAPORATES AND WHETHER HER

01:10PM 8 ABILITY TO BE A JUROR IS THEN SORT OF MADE A LITTLE EASIER, AND

01:10PM 9 DOES THAT EXPLAIN THE "I DON'T KNOW" ANSWER BECAUSE OF THE

01:10PM 10 TRANSITION TIME WE'RE IN.

01:10PM 11 I SUPPOSE I'M LEFT IN A POSITION OF NOT REALLY BEING ABLE

01:10PM 12 TO PROVIDE MUCH OF A RECOMMENDATION TO THE COURT. I SUPPOSE MY

01:10PM 13 ANSWER IS LIKE HERS, I DON'T KNOW. IT'S A CLOSE CALL, AND THE

01:10PM 14 RECORD IS JUST INCOMPLETE ON HER REQUEST.

01:10PM 15 THE COURT: MR. COOPERSMITH, ANYTHING FURTHER ON

01:10PM 16 THAT ONE?

01:10PM 17 MR. COOPERSMITH: THAT'S ALL I HAVE, YOUR HONOR.

01:10PM 18 THE COURT: ALL RIGHT. THANK YOU.

01:10PM 19 I WAS HOPING WHEN I ASKED THE QUESTIONS, I TYPICALLY DO

01:10PM 20 ABOUT CONFLICTS AND THINGS, THAT WE WOULD HAVE A MORE FULSOME

01:10PM 21 ANSWER ABOUT SOLUTIONS, AND "I DON'T KNOW" IS THE BEST SHE

01:10PM 22 COULD DO WHEN I ASKED HER THE QUESTION.

01:10PM 23 WE DIDN'T CALL HER BACK TO ASK FOR FOLLOWUP.

01:11PM 24 I THINK IN THE TOTALITY OF HER CIRCUMSTANCES, WITH HER

01:11PM 25 97-YEAR YOUNG MOTHER AND THE 3-YEAR OLD, IT SOUNDS LIKE HER

01:11PM 1 HANDES ARE QUITE FULL ALREADY.

01:11PM 2 SO I'M GOING TO STRIKE HER FOR HARSHIP. JUROR 6 IS

01:11PM 3 STRICKEN FOR HARSHIP.

01:11PM 4 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

01:11PM 5 MOVING ON TO THE NEXT ONE ON THE LIST -- OBVIOUSLY

01:11PM 6 NUMBER 10 WAS ALREADY STRUCK.

01:11PM 7 WE MOVE ON TO NUMBER 14, JUROR NUMBER 14.

01:11PM 8 THE COURT: YES.

01:11PM 9 MR. COOPERSMITH: SO THIS WAS A WOMAN WHO SAID THAT

01:11PM 10 HER CONCERN WAS THAT POLISH -- I'M SORRY, ENGLISH WAS NOT HER

01:11PM 11 FIRST LANGUAGE. SHE SAID THE CASE IS SO SERIOUS THAT I HAVE

01:11PM 12 CONCERNS THAT LAW TERMINOLOGY OR FINANCE TERMINOLOGY, SHE'S

01:11PM 13 REALLY NERVOUS ABOUT THIS AND IT MIGHT REALLY AFFECT, REALLY

01:11PM 14 AFFECT REALLY MY COMPREHENSION AND THE VERDICT.

01:11PM 15 AND THEN DURING THE COLLOQUY I HAD WITH HER, YOUR HONOR, I

01:11PM 16 ASKED HER ABOUT THAT ISSUE, AND SHE WAS TALKING ABOUT WATCHING

01:12PM 17 MOVIES AND HOW SHE DIDN'T REALLY HAVE A COMPREHENSION OF MOVIES

01:12PM 18 AND THAT SHE WAS ALWAYS HAVING TO ASK PEOPLE WHAT WAS GOING ON,

01:12PM 19 WHICH SHE OBVIOUSLY COULDN'T DO AS A JUROR.

01:12PM 20 AND SO WE THOUGHT FOR THAT REASON -- AND THIS IS A -- I

01:12PM 21 KNOW WHAT YOUR HONOR SAID, AND WE WILL, OF COURSE -- I'M SURE

01:12PM 22 THE GOVERNMENT WILL AS WELL -- WILL TRY TO MAKE THIS AS

01:12PM 23 DIGESTIBLE AS WE CAN, AND IT'S TO OUR ADVANTAGE AND ALL OF OUR

01:12PM 24 ADVANTAGES TO DO THAT.

01:12PM 25 HOWEVER, THIS JUROR, I THINK, SAID SEVERAL TIMES SHE HAD

01:12PM 1 CONCERNS.

01:12PM 2 I'LL JUST MENTION, AND I'M TALKING ABOUT HARDSHIP, SHE DID

01:12PM 3 MENTION IN HER QUESTIONNAIRE THAT HER HUSBAND ALWAYS SAYS THAT

01:12PM 4 THERANOS WAS THE BIGGEST SCAM. THAT WAS QUESTION 39.

01:12PM 5 AND IN QUESTION 41, SHE WROTE, SHE GOT MONEY FROM PEOPLE

01:12PM 6 PROMISING NEVER TO DELIVER.

01:12PM 7 AND I KNOW SHE ANSWERED SOME QUESTIONS THAT SUGGESTED THAT

01:12PM 8 SHE COULD STILL BE FAIR. WE HAVE THAT LINGERING CONCERN.

01:12PM 9 BUT THE HARDSHIP ISSUE TO US ON THE ENGLISH LANGUAGE AND

01:12PM 10 THE FAILURE TO COMPREHEND MOVIES WE THINK WOULD BE ENOUGH TO

01:13PM 11 STRIKE.

01:13PM 12 THE COURT: OKAY.

01:13PM 13 MR. SCHENK: YOUR HONOR, THE GOVERNMENT OPPOSES

01:13PM 14 EXCUSING JUROR 14 FOR HARDSHIP. SHE HAS BEEN IN THE

01:13PM 15 UNITED STATES I THINK SHE SAID FOR 30 YEARS.

01:13PM 16 SHE ENGAGED THOUGHTFULLY IN DIALOGUE WITH THE COURT AND

01:13PM 17 WITH MR. COOPERSMITH ON ALL OF THESE ISSUES.

01:13PM 18 IF YOU LOOK AT HER QUESTIONNAIRE, SHE ANSWERED THE

01:13PM 19 QUESTIONS. SHE DIDN'T JUST CHECK YES OR NO. ON MANY OCCASIONS

01:13PM 20 SHE WROTE OUT RESPONSES. SHE EVEN WROTE NOT APPLICABLE OR N-A

01:13PM 21 TO CERTAIN QUESTIONS. THAT SHOWED SHE WASN'T SKIPPING

01:13PM 22 QUESTIONS THAT SHE FOUND CONFUSING OR DIDN'T KNOW HOW TO

01:13PM 23 RESPOND TO.

01:13PM 24 BUT HER QUESTIONNAIRE ALSO DOESN'T SUGGEST SOMEONE WHOSE

01:13PM 25 LANGUAGE DIFFICULTIES WOULD RISE TO THE LEVEL OF A HARDSHIP FOR

01:13PM 1 OUR CASE.

01:13PM 2 THE COURT: ALL RIGHT. THANK YOU.

01:13PM 3 SHE WAS -- I DON'T WANT TO USE THE WORD "ENTERTAINING,"

01:13PM 4 BUT SHE DID EXCHANGE WITH THE COURT AND COUNSEL, I THOUGHT

01:14PM 5 EFFECTIVELY. AND ACTUALLY, AS THE DAY WENT ON, I THOUGHT SHE

01:14PM 6 GOT BETTER, CANDIDLY. IT SEEMED TO BE HER ATTENTION LEVEL WAS

01:14PM 7 INCREASED.

01:14PM 8 SHE TOLD US ABOUT THE MOVIES. I WAS STRUCK WITH PERHAPS

01:14PM 9 SHE WAS BEING A MOVIE CRITIC BECAUSE SHE SAID, MY HUSBAND

01:14PM 10 WATCHES THESE POLITICAL MOVIES, AND IT'S HARD FOR ME TO FOLLOW

01:14PM 11 THE POLITICAL MOVIES.

01:14PM 12 AND I DON'T KNOW IF THAT WAS THE PLOT, BECAUSE SOMETIMES

01:14PM 13 THOSE ARE DENSE AND THICK AND FULL OF SURPRISES, OR WHETHER IT

01:14PM 14 WAS SOMETHING ELSE.

01:14PM 15 SHE DID, IN RESPONSE TO ONE OF OUR QUESTIONS ABOUT -- I

01:14PM 16 THINK IT WAS MR. SCHENK, WELL, WHAT DO YOU DO IF THE T.V. IS

01:14PM 17 ON? BECAUSE SHE SAID THE T.V. IS ALWAYS ON IN HER HOUSEHOLD,

01:14PM 18 OR FREQUENTLY ON.

01:14PM 19 SHE SAID, DO I JUST RUN OUT OF THE ROOM? WELL, I GUESS

01:14PM 20 THAT'S WHAT I'LL DO, I'LL RUN OUT OF THE ROOM.

01:14PM 21 SO SHE SEEMED TO HAVE COMPREHENSIVE KNOWLEDGE ABOUT THE

01:14PM 22 INSTRUCTION THAT THAT QUESTION, AND THE RESPONSE WAS PHRASED

01:15PM 23 TO, THE NEED NOT TO BE EXPOSED.

01:15PM 24 AND SHE HAS BEEN HERE 30 YEARS. I RECOGNIZE THAT -- I

01:15PM 25 THINK POLISH IS HER FIRST LANGUAGE. BUT I, I DIDN'T HAVE

01:15PM 1 DIFFICULTY COMMUNICATING WITH HER, AND I DIDN'T OBSERVE THAT
01:15PM 2 COUNSEL DID.

01:15PM 3 YOU MAY HAVE HAD TO REPEAT A QUESTION, BUT I DON'T THINK
01:15PM 4 IT WAS LANGUAGE. I THINK IT WAS AUDITORY. THE MICROPHONES
01:15PM 5 WERE NOT WORKING.

01:15PM 6 BUT I'M NOT GOING TO FIND A HARSHIP OR A CAUSE FOR HER.

01:15PM 7 SO SHE'LL REMAIN ON THE PANEL.

01:15PM 8 MR. COOPERSMITH: UNDERSTOOD, YOUR HONOR.

01:15PM 9 AND BY THE WAY, I'LL ALSO MENTION THAT SHE COMPLAINED
01:15PM 10 ABOUT A FINGER INJURY.

01:15PM 11 THE COURT: YES.

01:15PM 12 MR. COOPERSMITH: AND I DON'T KNOW THAT THAT WAS A
01:15PM 13 REASON TO STRIKE HER, SO I WASN'T INCLUDING THAT.

01:15PM 14 THE COURT: SHE SEEMED TO -- SHE HELD IT UP, I
01:15PM 15 THINK. AND I SAW HER. SHE TOLD US SHE HAD TO EXERCISE IT, AND
01:15PM 16 MY OBSERVATION WAS THAT THERE WERE A COUPLE OF TIMES WHEN SHE
01:15PM 17 WAS MOVING HER HAND AROUND AND CLOSING IT AND OPENING IT, AND I
01:15PM 18 DON'T KNOW IF THAT WAS THE EXERCISE SHE WAS REFERENCING, BUT --

01:16PM 19 MR. COOPERSMITH: YES, YOUR HONOR.

01:16PM 20 THE COURT: OKAY.

01:16PM 21 MR. COOPERSMITH: THAT BRINGS US TO JUROR NUMBER 31.

01:16PM 22 THIS WAS THE YOUNG MAN WHO SAID HE HAD BEEN ON OTHER
01:16PM 23 JURIES. HE SAID IT WAS A THIRD TIME THAT HE HAD BEEN CALLED.
01:16PM 24 YOU REMEMBER HIM.

01:16PM 25 THE COURT: YES. I DON'T NEED TO HEAR A LOT ABOUT

01:16PM 1 31. I THINK I HEARD A LOT ABOUT 31 FROM HIS OWN MOUTH, SO I
01:16PM 2 DON'T NEED ANY ASSISTANCE FOR 31. I'M GOING TO STRIKE HIM FOR
01:16PM 3 HARSHSHIP.

01:16PM 4 THANK YOU FOR YOUR OFFER.

01:16PM 5 MR. COOPERSMITH: YES, YOUR HONOR.

01:16PM 6 NEXT ONE FOR HARSHSHIP IS 42.

01:16PM 7 SO WE LOOKED BACK AT THE TRANSCRIPT, AND IT'S QUOTED IN
01:16PM 8 THE LIST I HANDED UP, YOUR HONOR, THE TRANSCRIPT CITES.

01:16PM 9 SO JUST GOING THROUGH THE BULLET POINTS, HE SAID, "SO I'VE
01:16PM 10 BEEN APPLYING FOR THE LAST MONTH FOR A JOB. SINCE I WAS AWAY
01:16PM 11 FROM WORK FOR THE LAST TEN YEARS IT WAS NOT, LIKE, REALLY EASY
01:17PM 12 TO FIND SOME," REFERRING TO APPLYING FOR A JOB.

01:17PM 13 AND THEN HE CONTINUED. "AT PRESENT I HAVE ONE OFFER
01:17PM 14 ALREADY, AND TODAY, THIS MORNING, I RECEIVED IN THE MAIL
01:17PM 15 THEY'RE PUTTING ONE FOR ME, THE SECOND ONE, LIKE TODAY,
01:17PM 16 SOMETHING, THAT I'M WILLING TO TAKE."

01:17PM 17 AND THEN HE TALKED ABOUT THE DIFFICULTY OF A START DATE.

01:17PM 18 THE COURT: SHE.

01:17PM 19 MR. COOPERSMITH: I'M SORRY, YOUR HONOR, SHE HAD
01:17PM 20 DIFFICULTY WITH THE START DATE.

01:17PM 21 AND THEN YOUR HONOR HAD A DIALOGUE WITH HER WHERE YOU
01:17PM 22 ASKED HER ABOUT THE CONCERN, AND SHE SAID THAT ULTIMATELY, "AND
01:17PM 23 THEY WOULD BE, LIKE, TRAINING, I WOULDN'T BE ABLE TO LEARN THE
01:17PM 24 THING PROPERLY IF I'M NOT THERE."

01:17PM 25 SO BASICALLY IN A NUTSHELL, SHE WAS TOLD -- SHE WAS

01:17PM 1 LOOKING FOR A JOB, SHE HADN'T WORKED FOR A WHILE OUTSIDE OF THE
01:18PM 2 HOME APPARENTLY. SHE DECIDED TO GET BACK INTO THE WORK FORCE.
01:18PM 3 SHE APPLIED FOR A COUPLE OF JOBS. SHE HAD AN OFFER, I THINK IT
01:18PM 4 WAS BEING PREPARED AND SHE WAS GOING TO GET IT. SHE WANTED TO
01:18PM 5 ACCEPT IT AND SHE FELT IT WOULD BE VERY DIFFICULT TO SAY, WELL,
01:18PM 6 ACTUALLY THANK YOU, BUT I'M NOT GOING TO BE ABLE TO START FOR
01:18PM 7 THREE MONTHS.

01:18PM 8 SO THAT SEEMED TO BE A PROBLEM FOR HER AND A REASON TO
01:18PM 9 STRIKE HER.

01:18PM 10 MR. SCHENK: YOUR HONOR, I THINK THIS ONE IS ALSO A
01:18PM 11 CLOSE CALL, LIKE NUMBER 6. THERE'S TWO JOB OFFERS SHE TALKED
01:18PM 12 ABOUT WITH THE COURT.

01:18PM 13 THE FIRST ONE SHE ACTUALLY KNEW ABOUT WHEN SHE FILLED OUT
01:18PM 14 THE QUESTIONNAIRE. IT'S NOT THE ONE THAT SHE WAS INCLINED TO
01:18PM 15 ACCEPT.

01:18PM 16 THE SECOND ONE SHE RECEIVED THE OFFER, OR AT LEAST
01:18PM 17 COMMUNICATION THAT SHE WOULD RECEIVE AN OFFER AFTER FILLING OUT
01:18PM 18 THE QUESTIONNAIRE, BUT BEFORE COMING TO COURT FOR THE JURY
01:18PM 19 SELECTION PROCESS.

01:18PM 20 WHAT SHE SAID WAS, THAT IS THE ONE THAT I WANT TO ACCEPT.
01:18PM 21 THAT ONE HAS A START DATE I THINK SHE SAID THE 28TH OF MARCH.
01:18PM 22 AND SHE DIDN'T HAVE THE WRITTEN OFFER YET, AND SHE HAD NOT
01:18PM 23 COMMUNICATED WITH THEM ABOUT THE IMPACT OF JURY SERVICE AND, IN
01:19PM 24 PARTICULAR, WHETHER THE JURY SERVICE WOULD AFFECT HER ABILITY
01:19PM 25 TO TRAIN AT THIS NEW EMPLOYER OR WHETHER SHE WOULD START SORT

01:19PM 1 OF BEHIND BECAUSE SHE MISSED THE TRAINING.

01:19PM 2 I REALLY WOULD PREFER IF WE HAD A LITTLE MORE DEVELOPED ON

01:19PM 3 THAT, THE WRITTEN OFFER AND THE INFORMATION ABOUT WHETHER THERE

01:19PM 4 IS ACTUALLY A CONFLICT BETWEEN OUR DAYS OF TRIAL AND HER

01:19PM 5 ABILITY TO TRAIN.

01:19PM 6 THAT SAID, IT DOES WORRY ME A LITTLE BIT THAT KEEPING HER

01:19PM 7 ON, INCLUDING HER IN THE SELECTION IS GOING TO GIVE US A JUROR

01:19PM 8 WHO VERY QUICKLY IS GOING TO HAVE A CRYSTALLIZED HARDSHIP.

01:19PM 9 I DON'T THINK IT'S CRYSTALLIZED TODAY, BUT IT FEELS LIKE

01:19PM 10 WE'RE ON THE EVE OF A CRYSTALLIZED HARDSHIP.

01:19PM 11 THE COURT: THANK YOU.

01:19PM 12 ANYTHING FURTHER, MR. COOPERSMITH?

01:19PM 13 MR. COOPERSMITH: YOUR HONOR, JUST THAT ONE THING --

01:19PM 14 THE COURT: YOU DON'T HAVE TO IF YOU DON'T WANT TO.

01:19PM 15 MR. COOPERSMITH: WELL, NO. I'LL JUST SAY REAL

01:19PM 16 QUICKLY THAT IT'S ONE THING TO HAVE AN ESTABLISHED JOB AND YOU

01:20PM 17 CAN TELL YOUR EMPLOYER I'LL COME DO JURY SERVICE.

01:20PM 18 BUT IN THIS SITUATION IT SEEMED REALLY PROBLEMATIC FOR

01:20PM 19 HER.

01:20PM 20 THE COURT: YEAH, IT IS -- IT IS REGRETTABLE THAT

01:20PM 21 HER NEW JOB AND THE TRIAL START, COINCIDE SOMEWHAT AND OVERLAP.

01:20PM 22 I THOUGHT, WELL, WHY DON'T YOU JUST -- WE'LL TAKE A BREAK

01:20PM 23 AND WHY DON'T YOU CALL THEM AND TELL THEM YOU ACCEPT, BUT YOU

01:20PM 24 WON'T BE AVAILABLE FOR THREE MONTHS.

01:20PM 25 THAT'S NOT REALISTIC, I THINK, IN TODAY'S MARKET.

01:20PM 1 AND SHE, I THINK, HAS A SPECIALIZED FIELD. I THINK SHE
01:20PM 2 HAS ADVANCED DEGREES.

01:20PM 3 I'M GOING TO STRIKE HER FOR HARSHSHIP.

01:20PM 4 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

01:20PM 5 THAT BRINGS US TO JUROR NUMBER 79. SHE WAS THE SOCIAL
01:20PM 6 WORKER AT THE DAVITA DIALYSIS CLINIC. SHE EXPLAINED HOW SHE
01:20PM 7 OVERSAW ABOUT 130 PATIENTS. SHE'S MOVING TO A DIFFERENT
01:20PM 8 LOCATION WITH HER CLINIC.

01:21PM 9 AND THEN SHE TALKED ABOUT HOW THE SOCIAL WORKERS WERE
01:21PM 10 ALREADY COVERING OTHER CLINICS AND SHE SAID IT WOULD BE A VERY
01:21PM 11 LARGE IMPACT ON HER PATIENTS.

01:21PM 12 THAT'S PRETTY MUCH THE GIST OF THAT. BUT THAT'S WHAT CAME
01:21PM 13 UP WITH HER.

01:21PM 14 MR. SCHENK: YOUR HONOR, THE GOVERNMENT WOULD OPPOSE
01:21PM 15 EXCUSING 79 FOR HARSHSHIP. I BELIEVE DAVITA IS A VERY LARGE
01:21PM 16 EMPLOYER. THERE ARE OTHER INDIVIDUALS, OTHER SOCIAL WORKERS
01:21PM 17 AVAILABLE. I APPRECIATE THAT.

01:21PM 18 THE PROCESS OF COVERING DOWN OR COVERING OVER WOULD BE
01:21PM 19 BURDENSOME, BUT I DID NOT GET THE IMPRESSION FROM HER
01:21PM 20 STATEMENTS THAT THERE WAS AN INABILITY TO COVER.

01:21PM 21 THERE WERE CHALLENGES, AND JURY SERVICE PRESENT CHALLENGES
01:21PM 22 FOR ALL OF THE JURORS THAT WE ASK TO SIT, ESPECIALLY IN A TRIAL
01:21PM 23 OF THIS LENGTH.

01:21PM 24 BUT I DON'T KNOW THAT WHAT WE HEARD FROM HER REGARDING THE
01:21PM 25 IMPACT WAS SUFFICIENT TO RISE TO A HARSHSHIP THE GOVERNMENT

01:21PM 1 WOULD SUPPORT IN THIS CASE.

01:21PM 2 THE COURT: SHE WAS -- SHE TOLD US ABOUT THE IMPACT.

01:21PM 3 IT SEEMED, IN MY VIEW, THAT SHE HAD GREAT CONCERN FOR THE

01:22PM 4 IMPACT, OF COURSE WITH HER PATIENTS, BUT ALSO ON HER COLLEAGUES

01:22PM 5 THAT WOULD BE ABSORBING HER CASELOAD OR SOMEHOW SPLITTING UP

01:22PM 6 HER CASELOAD.

01:22PM 7 INTERESTING, SHE DID NOT TELL US THAT SHE WAS CONCERNED

01:22PM 8 WITH A FINANCIAL ISSUE THAT WE FREQUENTLY SEE, AND THAT WASN'T

01:22PM 9 COVERED. THAT WASN'T RAISED BY HER THAT SHE WAS CONCERNED

01:22PM 10 THAT SHE MIGHT NOT BE PAID OR IT WOULD CAUSE A HARDSHIP TO HER

01:22PM 11 FAMILY INCOME AT ALL.

01:22PM 12 SHE DID TALK ABOUT THE CONCERN OF WORK ON HER COLLEAGUES,

01:22PM 13 AND I THINK THAT SPEAKS HIGHLY OF HER. SHE'S PROBABLY JUST A

01:22PM 14 WONDERFUL COWORKER TO BE WITH, AND COMMITTED TO HER PATIENTS,

01:22PM 15 BUT I DON'T SEE ENOUGH TO EXCUSE HER FOR HARDSHIP BASED ON THE

01:22PM 16 RECORD.

01:22PM 17 SO I'M NOT GOING TO STRIKE HER FOR HARDSHIP.

01:22PM 18 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

01:22PM 19 MOVING ON TO JUROR 101.

01:22PM 20 JUROR 101 IS THE WOMAN WHO SAID SHE OWNED FIVE

01:23PM 21 RESTAURANTS. SHE SAID HER HUSBAND MANAGED ONE OF THE

01:23PM 22 RESTAURANTS I BELIEVE.

01:23PM 23 THE COURT: WAS ONE OF THEM IN SEATTLE ALSO, I

01:23PM 24 THINK?

01:23PM 25 MR. COOPERSMITH: WE HAVE A LOT OF GREAT VIETNAMESE

01:23PM 1 RESTAURANTS IN SEATTLE. I'M NOT SURE HERS IS ONE OF THEM.

01:23PM 2 SO SHE SAID SHE OWNED THESE RESTAURANTS AND SHE SAID SHE

01:23PM 3 HAD TO GO TO THE MARKET EVERY DAY.

01:23PM 4 AND SHE ALSO HAD SOME FAMILY RESPONSIBILITY. SHE HAD

01:23PM 5 THREE CHILDREN WHO WERE YOUNG, AGES 4, 9, AND 11.

01:23PM 6 AND THEN SHE -- IT WAS EITHER HERE OR HER HUSBAND WHO

01:23PM 7 COULD DO THE DROPOFF AND THE PICKUP OF THE CHILDREN, BUT THOSE

01:23PM 8 ARE OTHER PEOPLE, BUT THEN SHE ALSO HAD TO MANAGE THE

01:23PM 9 RESTAURANTS.

01:23PM 10 AND I'LL ALSO NOTE, YOUR HONOR, THAT ON HER QUESTIONNAIRE,

01:23PM 11 SHE INDICATED A PROBLEM WITH UNDERSTANDING ENGLISH.

01:23PM 12 SO THAT'S, IN A NUTSHELL, THE HARDSHIP WITH HER.

01:23PM 13 MR. SCHENK: YOUR HONOR, THE GOVERNMENT OPPOSES

01:23PM 14 EXCUSING 101 FOR HARDSHIP.

01:24PM 15 FIRST, THE HOW OLD QUESTION, SHE SAID ACTUALLY, "THE KIDS

01:24PM 16 ARE OKAY, WE HAVE HELP." I BELIEVE THEY HIRE SOMEONE.

01:24PM 17 HER QUESTIONNAIRE I WOULD SAY DOES NOT SUPPORT DIFFICULTY

01:24PM 18 UNDERSTANDING ENGLISH. SHE ANSWERS THE QUESTIONS. SHE WRITES

01:24PM 19 ADDITIONAL RESPONSES IN ENGLISH TO QUESTIONS THAT CALL FOR

01:24PM 20 ADDITIONAL INFORMATION.

01:24PM 21 SO THAT LEAVES US WITH THE QUESTION OF COVERAGE FOR

01:24PM 22 RESTAURANTS. SHE SAID THAT WHAT SHE -- SHE OWNS THEM. THERE

01:24PM 23 ARE OBVIOUSLY EMPLOYEES THAT WORK AT THEM, AND THEN THE

01:24PM 24 PARTICULAR ISSUE WAS GOING TO THE MARKET EVERY DAY TO SUPPLY

01:24PM 25 THE RESTAURANT, AND SHE SAID THAT SHE HAS OTHER PEOPLE WHO CAN

01:24PM 1 HELP HER WITH THAT.

01:24PM 2 WHAT HER CONCERN WAS, I CAN RELY ON THESE OTHER PEOPLE FOR

01:24PM 3 A FEW WEEKS, BUT WILL I BE ABLE TO RELY ON OTHERS BEYOND THOSE

01:24PM 4 INITIAL WEEKS?

01:24PM 5 AND I DON'T -- I GUESS MY BELIEF IS THAT THE RECORD DOES

01:24PM 6 NOT ACTUALLY SUPPORT SOME STATEMENT THAT THERE REALLY IS A

01:25PM 7 HARDSHIP, THE HARDSHIP WILL CRYSTALLIZE AT THIS POINT BECAUSE

01:25PM 8 OF THIS REASON.

01:25PM 9 I THINK WHAT THE EVIDENCE OR THE RECORD BEFORE US SHOWS IS

01:25PM 10 THAT SHE HAS HELP IN BOTH PLACES THAT SHE ARTICULATED HARDSHIP.

01:25PM 11 SHE HAS OTHERS WHO HELP CARE FOR THE KIDS, AND SHE HAS OTHERS

01:25PM 12 WHO HELP TAKE CARE OF THE RESTAURANT.

01:25PM 13 AND AS A RESULT I DON'T THINK SHE QUALIFIES FOR A

01:25PM 14 HARDSHIP.

01:25PM 15 THE COURT: THANK YOU.

01:25PM 16 I THINK SHE TOLD US SHE HAS ONE EMPLOYEE THAT SHE HELD IN

01:25PM 17 HIGH REGARD. I THINK, WASN'T THAT HER HUSBAND?

01:25PM 18 (LAUGHTER.)

01:25PM 19 MR. COOPERSMITH: THAT'S TRUE, YOUR HONOR.

01:25PM 20 THE COURT: AND THAT SEEMED TO SUGGEST -- AND LET ME

01:25PM 21 SAY, HER PRESENCE WAS KNOWN TO THE COURT. LET ME SAY THAT. I

01:25PM 22 DON'T THINK SHE WAS SHY ABOUT ANSWERING QUESTIONS AND I DON'T

01:25PM 23 THINK SHE HAD DIFFICULTY ANSWERING YOUR QUESTIONS.

01:25PM 24 MY SENSE IS THAT SHE PROBABLY HAS BEEN RUNNING HER

01:25PM 25 BUSINESS FOR 13 YEARS SHE TELLS US, AND SHE SAYS IT'S AN

01:25PM 1 ONGOING CONCERN. SHE KNOWS HOW TO DO THAT.

01:26PM 2 MY SENSE IS THAT HER BUSINESS MANAGEMENT SKILLS, SHE'S

01:26PM 3 PROBABLY A LITTLE HUMBLE ABOUT THOSE.

01:26PM 4 SO I'M GOING TO DENY TO FIND A HARSHIP FOR HER. I THINK

01:26PM 5 SHE CAN ENGAGE REPLACEMENTS TO MANAGE THE DIFFICULTIES THAT SHE

01:26PM 6 EXPRESSED.

01:26PM 7 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

01:26PM 8 ONE OTHER ISSUE I WANTED TO RAISE WITH THE COURT IS NOT ON

01:26PM 9 THE LIST THAT WE PASSED UP, BUT WE WERE JUST REMEMBERING DURING

01:26PM 10 THE BREAK, IS THAT THERE WAS ONE JUROR, WHO WAS NUMBER 119, AND

01:26PM 11 THE ONLY THING I WANTED TO RAISE TO THE COURT WAS THAT SHE SAID

01:26PM 12 THAT SHE HAD EMAILED, I BELIEVE SHE SAID, HER DOCTOR, BECAUSE

01:26PM 13 THIS WAS THE WOMAN WHO SAID SHE WOULD BE 31 WEEKS PREGNANT SHE

01:26PM 14 PREDICTED AT THE END OF THE TRIAL.

01:26PM 15 THE COURT: RIGHT.

01:26PM 16 MR. COOPERSMITH: AND SHE SAID SHE EMAILED HER

01:26PM 17 DOCTOR AND HAD NOT HEARD BACK YET.

01:27PM 18 THE COURT: RIGHT.

01:27PM 19 MR. COOPERSMITH: AND I WONDERED IF WE SHOULD FOLLOW

01:27PM 20 UP TO SEE.

01:27PM 21 BECAUSE THE ISSUE WAS SHE WAS ASKING THE DOCTOR IF SOMEHOW

01:27PM 22 STRESS WITH THE TRIAL WOULD IMPACT HER, BUT WE DON'T KNOW THE

01:27PM 23 ANSWER TO THAT. BUT SHE WAS EMAILING THE DOCTOR, AND WE JUST

01:27PM 24 DON'T KNOW.

01:27PM 25 THE COURT: MR. SCHENK.

01:27PM 1 MR. SCHENK: I CERTAINLY DON'T -- I'M NOT AWARE OF

01:27PM 2 WHAT WOULD CHANGE THE RECORD ON THE HARSHNESS SINCE WHEN WE LAST

01:27PM 3 DISCUSSED THIS.

01:27PM 4 SHE'S PART OF THE VENIRE UNTIL WE RECEIVE ADDITIONAL

01:27PM 5 INFORMATION THAT WOULD LEAD US TO REEVALUATE THAT SITUATION.

01:27PM 6 THE COURT: SHE INDICATED IN HER QUESTIONNAIRE AND

01:27PM 7 TO US THAT SHE WAS SOMEWHAT CONCERNED, AND I THINK HER

01:27PM 8 STATEMENT WAS I JUST WANT TO LET YOU GUYS KNOW, I THINK IS WHAT

01:27PM 9 SHE SAID.

01:27PM 10 AND I ASKED ABOUT DOCTORS, AND SHE SAID, WELL, I'VE

01:27PM 11 EMAILED HER, AND I HAVEN'T HEARD BACK.

01:27PM 12 I DON'T KNOW IF -- MADAM CLERK, HAVE WE RECEIVED ANY

01:28PM 13 INDICATION FROM JUROR 119 VIA EMAIL OR PHONE MESSAGE?

01:28PM 14 THE CLERK: NO, NONE WHATSOEVER.

01:28PM 15 THE COURT: I'M LED TO THINK THAT IF SHE HAD HEARD

01:28PM 16 FROM HER DOCTOR WITH SOME ADVICE THAT SHE NOT DO THIS, SHE

01:28PM 17 SEEMED LIKE A RESPONSIBLE PERSON, SHE WOULD HAVE NOTIFIED THE

01:28PM 18 COURT, PERHAPS, OR MAYBE SHE'LL WAIT UNTIL SHE'S SUMMONED AND

01:28PM 19 THEN NOTIFY, AND THAT CREATES ANOTHER ISSUE, I SUPPOSE.

01:28PM 20 MR. COOPERSMITH: RIGHT.

01:28PM 21 THE COURT: BUT MY INTENT -- LET ME SAY THIS: I'M

01:28PM 22 NOT GOING TO, I'M NOT GOING TO EXCUSE HER NOW.

01:28PM 23 WHAT I'D LIKE TO DO IS -- I DON'T THINK THE RECORD IS

01:28PM 24 SUFFICIENT TO CAUSE ME TO DO THAT.

01:28PM 25 ANYTHING ELSE, OTHER STRIKES OR ANYTHING ELSE YOU WOULD

01:28PM 1 LIKE TO RAISE ABOUT OUR PANEL?

01:28PM 2 MR. COOPERSMITH: YES, YOUR HONOR.

01:28PM 3 THERE'S ONE MORE HARDSHIP RELATED ISSUE TO THE COURT, AND

01:28PM 4 THEN THERE'S ONE ADDITIONAL CAUSE ISSUE. SO IF I COULD ADDRESS

01:28PM 5 THOSE IN TURN?

01:28PM 6 THE COURT: SURE.

01:29PM 7 MR. COOPERSMITH: FIRST, THIS JUROR IS NUMBER 142

01:29PM 8 THAT I'M TALKING ABOUT RIGHT NOW.

01:29PM 9 NUMBER 142, I DON'T RECALL THAT THERE WAS ANY DIALOGUE

01:29PM 10 WITH HER, SO WE REALLY DON'T HAVE A LOT OF INFORMATION, AND

01:29PM 11 THAT HAPPENS, YOU KNOW, OBVIOUSLY SOMETIMES.

01:29PM 12 BUT I WENT BACK OVER THE BREAK AND I LOOKED AND I SAW THAT

01:29PM 13 IN THE QUESTIONNAIRE SHE DID RAISE THAT SHE HAD TROUBLE

01:29PM 14 UNDERSTANDING THE QUESTIONNAIRE. I THINK THAT'S QUESTION 70

01:29PM 15 AND 65.

01:29PM 16 AND THEN SHE -- YOU KNOW, SHE WAS RAISING THE ISSUE. IN

01:29PM 17 FACT, I THINK SHE MAYBE EVEN ASKED FOR A HARDSHIP EXCUSAL BASED

01:29PM 18 ON THE ENGLISH LANGUAGE DIFFICULTY.

01:29PM 19 SO THAT'S SOMETHING ELSE I NOTICED, AND I WANTED TO RAISE

01:29PM 20 THAT FOR THE COURT'S ATTENTION AS WELL.

01:29PM 21 THE COURT: I NOTICED THAT SOME OF THE QUESTIONS ARE

01:29PM 22 BLANK, I THINK, IN THE QUESTIONNAIRE.

01:29PM 23 MR. COOPERSMITH: YES, YOUR HONOR.

01:29PM 24 THE COURT: I DON'T HAVE IT IN FRONT OF ME NOW. I

01:29PM 25 HAVE MY NOTES.

01:29PM 1 BUT I THINK THERE ARE SOME PAGES THAT WERE BLANK, BUT SHE

01:30PM 2 WASN'T -- THERE WERE NO QUESTIONS POSED TO HER, WERE THERE, BY

01:30PM 3 COUNSEL OR THE COURT?

01:30PM 4 MR. COOPERSMITH: NO, YOUR HONOR, NOT THAT I CAN

01:30PM 5 RECALL.

01:30PM 6 THE COURT: THAT MEANS THAT SHE DIDN'T RAISE HER

01:30PM 7 HAND WHEN I EXPRESSED AN INVITATION TO.

01:30PM 8 MR. SCHENK: YOUR HONOR, I'M SCROLLING THROUGH 142'S

01:30PM 9 QUESTIONNAIRE NOW, AND AT LEAST IN MY REVIEW THERE'S SOME

01:30PM 10 QUESTIONS THAT ARE LEFT BLANK, BUT I DON'T NOTICE ANY WHOLE

01:30PM 11 PAGES WHERE SHE FAILS TO MAKE ANY MARKINGS.

01:30PM 12 SHE CHECKS DIFFERENT ANSWERS, SOMETIMES NO TO QUESTIONS.

01:30PM 13 I BELIEVE THERE WERE INSTANCES WHERE SHE WROTE NOT LENGTHY,

01:30PM 14 BUT, FOR INSTANCE, SHE -- TO THE QUESTION ABOUT HOBBIES, SHE

01:30PM 15 HAND WROTE IN TWO DIFFERENT HOBBIES TO THAT QUESTION TO

01:30PM 16 OCCUPATION OR JOBS.

01:30PM 17 SHE WROTE IN ANSWERS TO THOSE QUESTIONS.

01:30PM 18 SHE DOES TELL US THAT HER EDUCATIONAL BACKGROUND WAS IN A

01:31PM 19 DIFFERENT COUNTRY. SHE WRITES THE NAME OF THE COUNTRY IN THAT

01:31PM 20 QUESTION.

01:31PM 21 AND I AGREE, I DON'T HAVE ANY NOTES FROM 142 IN COURT.

01:31PM 22 SO I THINK THAT THE RECORD AT THIS POINT IS INSUFFICIENT

01:31PM 23 TO EXCUSE FOR LANGUAGE.

01:31PM 24 THE COURT: OKAY. THANK YOU.

01:31PM 25 I'M NOT GOING TO EXCUSE HER. WE JUST DON'T HAVE A FULSOME

01:31PM 1 RECORD ON HER, AND IT'S REGRETTABLE THAT NONE OF US ASKED HER
01:31PM 2 QUESTIONS ABOUT THIS, SO --

01:31PM 3 MR. COOPERSMITH: RIGHT.

01:31PM 4 THE COURT: AND YOUR NEXT WAS?

01:31PM 5 MR. COOPERSMITH: YES, YOUR HONOR.

01:31PM 6 NUMBER 52, THIS WAS A JUROR WHO WAS VERY CANDID AND
01:31PM 7 PERHAPS BRAVE AND DIDN'T MIND DISCUSSING PRIOR CONVICTIONS IN
01:31PM 8 OPEN PUBLIC, OPEN RECORD.

01:31PM 9 HE SAID THAT, IN THE TRANSCRIPT, THAT HE HAD BEEN ON THE
01:31PM 10 DEFENDANT'S SIDE OF THE LAW, SO HE SAID HE GUESSED HIS OPINION
01:31PM 11 OF BEING A DEFENDANT IS GENERALLY IF YOU'RE ACCUSED OR BEING
01:32PM 12 ACCUSED OR INDICTED FOR SOMETHING, IT'S GENERALLY YOU'RE GUILTY
01:32PM 13 OF IT. WHETHER OR NOT IT CAN BE PROVEN IS A DIFFERENT STORY.

01:32PM 14 AND THEN HE WENT ON TO SAY, SO GENERALLY IF YOU'RE ACCUSED
01:32PM 15 OF SOMETHING, IT'S GENERALLY BECAUSE YOU, YOU DID SOMETHING
01:32PM 16 WRONG, AGAIN, WHETHER YOU CAN PROVE IT OR NOT.

01:32PM 17 HE THINKS THAT IF SOMEONE HAS BEEN ARRESTED, ACCUSED,
01:32PM 18 INDICTED, THERE'S SOME GUILT IN THAT.

01:32PM 19 HE SAID THAT -- THE QUESTION TO HIM WAS, AND DO YOU THINK
01:32PM 20 IT WOULD BE DEFENSE'S OBLIGATION TO TRY TO PROVE THE INNOCENCE
01:32PM 21 OF IN THIS CASE MR. BALWANI?

01:32PM 22 AND HIS ANSWER WAS: I THINK SO.

01:32PM 23 AND THEN HE SAID: I DON'T THINK I'M ASKING HIM TO PROVE
01:32PM 24 INNOCENCE. IT'S MORE IN MY VIEW THINKING THAT THERE IS SOME
01:32PM 25 TRUTH IN ALLEGATIONS AND INDICTMENTS.

01:32PM 1 AND I THINK WE ASKED A LOT OF QUESTIONS OF HIM TO TRY TO
01:32PM 2 SHAKE HIM OFF OF IT, FOR LACK OF A BETTER WORD, TO UNDERSTAND
01:32PM 3 THE PROCESS. HE OBVIOUSLY HAD EXPERIENCE SOME TIME AGO WITH
01:32PM 4 THE CRIMINAL JUSTICE SYSTEM.

01:32PM 5 I THINK GIVEN THOSE ANSWERS, WE THINK THIS WOULD BE A
01:32PM 6 REASON TO STRIKE HIM FOR CAUSE.

01:32PM 7 MR. SCHENK: YOUR HONOR, THE GOVERNMENT OPPOSES
01:33PM 8 STRIKING 52 FOR CAUSE.

01:33PM 9 LET ME START WITH HIS QUESTIONNAIRE. ON QUESTIONS 39 AND
01:33PM 10 46, QUESTIONS THAT ASK ABOUT ABILITY TO BE FAIR AND IMPARTIAL,
01:33PM 11 HE ANSWERS NO.

01:33PM 12 FORGIVE ME. LET ME REPHRASE THAT. IS THERE ANYTHING THAT
01:33PM 13 WOULD INFLUENCE OR AFFECT YOUR ABILITY TO BE FAIR?

01:33PM 14 TO EACH ONE HE ANSWERS NO.

01:33PM 15 QUESTIONS ABOUT WHETHER, BECAUSE SOMEONE HAS BEEN CHARGED,
01:33PM 16 DOES THAT MEAN THAT THEY'RE MORE LIKELY TO BE GUILTY CAN BE
01:33PM 17 ANSWERED TWO DIFFERENT WAYS.

01:33PM 18 ONE WAY IS, DOES THE FACT OF THE CHARGE MAKE THEM GUILTY?
01:33PM 19 AND OBVIOUSLY THE ANSWER TO THAT IS NO BASED ON THE PRESUMPTION
01:33PM 20 OF INNOCENCE.

01:33PM 21 BUT THE OTHER WAY THAT QUESTION CAN BE ANSWERED IS, IN
01:33PM 22 YOUR EXPERIENCE, IS IT MORE LIKELY THAN NOT THAT THE PERSON WHO
01:33PM 23 HAS BEEN CHARGED IS ACTUALLY GUILTY?

01:33PM 24 WHICH BEGS THINGS LIKE CONVICTION RATES OR GUILTY PLEA
01:33PM 25 RATES.

01:33PM 1 AND IT'S CERTAINLY POSSIBLE THAT HIS EXPERIENCES, HIS LIFE
01:34PM 2 EXPERIENCES SUGGEST, AND HE WAS ANSWERING IT IN THE LATTER, NOT
01:34PM 3 THE FORMER. WHEN WE FOLLOWED UP WITH HIM -- AND BY "WE" I MEAN
01:34PM 4 THE COURT AND MR. COOPERSMITH -- HE SAID THAT HE CAN HOLD THE
01:34PM 5 GOVERNMENT TO ITS BURDEN. HE WOULD NOT REQUIRE THE DEFENDANT
01:34PM 6 TO PROVE INNOCENCE.

01:34PM 7 I'M NOT ASKING MR. BALWANI TO PROVE INNOCENCE. I CAN PUT
01:34PM 8 MY VIEWS IN A CLOSET. IT WOULD NOT BE DIFFICULT.

01:34PM 9 ANY DOUBT ABOUT THAT?

01:34PM 10 NO.

01:34PM 11 SO I THINK THE RECORD SUGGESTS THAT WHEN HE MAKES
01:34PM 12 STATEMENTS ABOUT THE FACT OF CHARGES, SPEAKING ABOUT THE
01:34PM 13 LIKELIHOOD OF GUILT, HE WAS SPEAKING ABOUT, DID THE PERSON
01:34PM 14 COMMIT THE CRIME IN THE WORLD? DID IT OCCUR?

01:34PM 15 AND NOT, IS HE GOING TO HOLD MR. BALWANI TO A BURDEN, TO
01:34PM 16 ANY BURDEN AT ALL IN THE TRIAL?

01:34PM 17 I THINK HIS ANSWERS ON THAT ARE CLEAR AND THERE'S NOT A
01:34PM 18 BASIS TO EXCUSE HIM FOR CAUSE.

01:34PM 19 THE COURT: THANK YOU. HE WAS -- AND THIS HAPPENED
01:35PM 20 WITH A COUPLE OF PROSPECTIVE JURORS ABOUT, WELL, THEY'RE HERE,
01:35PM 21 THIS MUST MEAN SOMETHING.

01:35PM 22 AND OF COURSE WE ALL THINK, WELL, OF COURSE, THERE'S
01:35PM 23 PROBABLE CAUSE, AND THAT'S WHAT GETS AN INDICTMENT, PERHAPS,
01:35PM 24 THAT'S WHERE IT GOES, THAT'S PART OF THE PATH, BUT THAT DOES
01:35PM 25 NOT MEAN THE SAME THING AS A CONVICTION BEYOND A REASONABLE

01:35PM 1 DOUBT.

01:35PM 2 WE DON'T GET INTO CRIMINAL LAW LECTURES WITH JURORS ABOUT

01:35PM 3 THOSE THINGS.

01:35PM 4 BUT WE CERTAINLY UNDERSTAND THE LAYPERSON'S OBSERVATION I

01:35PM 5 THINK OF THE JUSTICE SYSTEM AND HOW THOSE THINGS MIGHT CONFLATE

01:35PM 6 INTO ONE AS OPPOSED TO PARSED OUT.

01:35PM 7 HE HAS, AS WE KNOW FROM HIS CANDOR, EXPERIENCE IN THE

01:35PM 8 JUSTICE SYSTEM IN HIS YOUTH, AND HE TOLD US ABOUT THAT.

01:35PM 9 I HAD SOME CONCERNS ABOUT HIS COMMENTS AND HIS STATEMENTS

01:35PM 10 BOTH IN HIS QUESTIONNAIRE AND THEN SOME FOLLOWUP.

01:35PM 11 BUT AT THE END, I DO THINK AND I REMEMBER THE ANSWERS TO

01:36PM 12 THE QUESTIONS, AND I REMEMBER ASKING HIM, DO YOU HAVE ANY DOUBT

01:36PM 13 ABOUT THIS?

01:36PM 14 AND I ASKED THAT INTENTIONALLY BECAUSE IT WAS -- CANDIDLY,

01:36PM 15 THERE WAS A -- I'LL CALL IT A REHABILITATION OF HIS ANSWERS TO

01:36PM 16 TRY TO ASK HIM -- OR CLARIFICATION OF HIS ANSWERS TO WHAT THE

01:36PM 17 TRIAL WOULD BE ABOUT AND THE STANDARDS AND BURDEN OF PROOF, AND

01:36PM 18 THAT WAS HIS ANSWER, NO. OKAY.

01:36PM 19 I HAD MY FEELINGS, I CAN BE FAIR, I WILL BE FAIR, NO DOUBT

01:36PM 20 ABOUT THAT.

01:36PM 21 SO I'M NOT GOING TO STRIKE HIM FOR CAUSE. I CERTAINLY

01:36PM 22 UNDERSTAND THE CONCERNS THAT COLLOQUY WOULD BRING.

01:36PM 23 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

01:36PM 24 THE ONLY OTHER THING I WILL MENTION QUICKLY WITH HIM IS HE

01:36PM 25 DID SAY HE WATCHED PART, NOT THE ENTIRETY, BUT HE WALKED PART

01:36PM 1 OF THE ERIKA CHEUNG "TED TALK," WHICH WAS OF CONCERN TO US.

01:36PM 2 BUT THE OTHER THING I JUST WONDERED IS WITH THE PAST, IT

01:36PM 3 SOUNDED LIKE FELONY CONVICTIONS, HE MAY WELL HAVE HAD HIS CIVIL

01:36PM 4 RIGHTS RESTORED. NOBODY ASKED HIM THAT QUESTION, SO WE DON'T

01:37PM 5 KNOW THE ANSWER TO THAT.

01:37PM 6 THE COURT: OH.

01:37PM 7 MR. COOPERSMITH: HOW DOES THE COURT --

01:37PM 8 THE COURT: YOU CAN DO A RECORD CHECK OR SOMETHING.

01:37PM 9 I WAS -- HE SAID IN HIS YOUTH, AND I WAS CONCERNED, ARE

01:37PM 10 THESE JUVENILE CONVICTIONS THAT OTHERWISE WOULD NOT BE

01:37PM 11 ADMISSIBLE?

01:37PM 12 BUT WE DIDN'T ASK HIM THAT, AND I DIDN'T ASK HIM THAT.

01:37PM 13 HE SAID IN HIS YOUTH. I THINK HE TOLD US HIS AGE IN THE

01:37PM 14 QUESTIONNAIRE.

01:37PM 15 BUT THAT WAS MY THOUGHT. MAYBE I DID ASK HIM THAT

01:37PM 16 ACTUALLY. WELL, THIS WAS WHEN YOU WERE YOUNG?

01:37PM 17 MR. COOPERSMITH: DEFINITELY, YOUR HONOR, HE DID SAY

01:37PM 18 THAT. I JUST DON'T KNOW HOW YOUNG.

01:37PM 19 THE COURT: RIGHT. RIGHT.

01:37PM 20 MR. COOPERSMITH: BECAUSE OBVIOUSLY WHAT WE WOULDN'T

01:37PM 21 WANT IS FOR A JUROR TO BE SEATED AND THEN IT LATER TURNS OUT

01:37PM 22 THAT THE JUROR WAS INELIGIBLE.

01:37PM 23 THE COURT: RIGHT.

01:37PM 24 MR. COOPERSMITH: I DON'T KNOW ONE WAY OR THE OTHER

01:37PM 25 WHETHER HE IS OR ISN'T, BUT --

01:37PM 1 THE COURT: AND THE QUESTIONNAIRE DIDN'T ASK, HAVE
01:37PM 2 YOU BEEN CONVICTED OF A FELONY, DOES IT? WE DIDN'T ASK THAT.
01:37PM 3 MR. COOPERSMITH: IT DID NOT AS FAR AS I CAN
01:38PM 4 REMEMBER.
01:38PM 5 THE COURT: I'M TRYING TO RECALL. I DON'T HAVE THE
01:38PM 6 TRANSCRIPT IN FRONT OF ME, BUT I THINK HE TOLD US, DID HE,
01:38PM 7 THERE WERE THEFT OFFENSES, FRAUD OFFENSES, SOMETHING LIKE THAT?
01:38PM 8 MR. SCHENK: AN EMBEZZLEMENT.
01:38PM 9 MR. COOPERSMITH: THAT'S CORRECT.
01:38PM 10 THE COURT: RIGHT. RIGHT, QUERY WHETHER THAT WAS A
01:38PM 11 FELONY OR A MISDEMEANOR OR IT WAS, YOU KNOW, A WOBBLER THAT WAS
01:38PM 12 REDUCED TO A MISDEMEANOR AND THEN HE HAD HIS RECORD CLEARED
01:38PM 13 UNDER 1203.4 OF THE PENAL CODE I THINK IT IS.
01:38PM 14 MR. SCHENK: HE TOLD US THAT HIS AGE IS 48, AND THAT
01:38PM 15 HIS PRIORS WERE ABOUT 30 YEARS AGO.
01:38PM 16 THE COURT: WELL, THAT'S CUTTING IT CLOSE, ISN'T IT?
01:39PM 17 YOU KNOW, I THINK, LET ME JUST SAY THIS, OUT OF AN
01:39PM 18 ABUNDANCE OF CAUTION, I WOULD HATE TO SEE A JUROR SIT AND
01:39PM 19 DISCOVER THAT HE OR SHE WAS NOT QUALIFIED BECAUSE OF SOME OTHER
01:39PM 20 REASON.
01:39PM 21 SO LET ME STRIKE HIM OUT OF AN ABUNDANCE OF CAUTION.
01:39PM 22 MR. COOPERSMITH: THANK YOU, YOUR HONOR.
01:39PM 23 THOSE ARE ALL OF THE --
01:39PM 24 MR. SCHENK: I'M SORRY, THE BASIS IS CAUSE?
01:39PM 25 THE COURT: CAUSE, I'M SORRY.

01:39PM 1 NOT OUT OF AN ABUNDANCE OF CAUTION.

01:39PM 2 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

01:39PM 3 THOSE WERE ALL OF THE ADDITIONAL CAUSE AND HARDSHIP ISSUES

01:39PM 4 I WANTED TO RAISE.

01:39PM 5 I THINK IT MIGHT BE WISE FOR US ALL TO MAKE SURE WE ARE ON

01:39PM 6 THE SAME PAGE IN TERMS OF THE COUNT AT THIS POINT.

01:39PM 7 THE COURT: RIGHT.

01:39PM 8 MR. COOPERSMITH: I BELIEVE WE MIGHT BE RIGHT AT 40.

01:39PM 9 MR. SCHENK: I THINK 41, AND I CAN READ THE NUMBERS

01:39PM 10 IF THAT WOULD BE HELPFUL.

01:39PM 11 THE COURT: WELL, WHY DON'T -- THAT WOULD BE

01:40PM 12 HELPFUL, BUT LET'S TAKE A BREAK. LET'S TAKE ABOUT TEN MINUTES

01:40PM 13 AND LET YOU LOOK AT YOUR CALCULATIONS AND SEE WHERE YOU ARE,

01:40PM 14 AND THEN WE'LL COUNT UP AND SEE WHAT THAT IS.

01:40PM 15 WOULD THAT BE ALL RIGHT?

01:40PM 16 MR. COOPERSMITH: YES, YOUR HONOR.

01:40PM 17 MR. SCHENK: YES.

01:40PM 18 THE COURT: AND THEN MAYBE WE CAN GO FORWARD IF WE

01:40PM 19 HAVE SUFFICIENT NUMBERS.

01:40PM 20 MR. COOPERSMITH: YEAH, AND I MAY HAVE SOME

01:40PM 21 ADDITIONAL THOUGHTS TO OFFER BEFORE THAT. BUT, YES, YOUR

01:40PM 22 HONOR, OF COURSE.

01:40PM 23 THE COURT: OKAY. LET'S TAKE ABOUT TEN MINUTES.

01:40PM 24 (RECESS FROM 1:40 P.M. UNTIL 1:56 P.M.)

01:56PM 25 THE COURT: WE'RE BACK ON THE RECORD. ALL PARTIES

01:56PM 1 PREVIOUSLY PRESENT ARE PRESENT ONCE AGAIN.

01:56PM 2 COUNSEL, WHAT IS THE STATUS OF THINGS?

01:56PM 3 MR. SCHENK: YOUR HONOR, WE'VE MET AND CONFERRED,

01:56PM 4 AND WE HAVE A LIST OF REMAINING JURORS THAT WE AGREE UPON.

01:56PM 5 THERE ARE 40 REMAINING JURORS.

01:56PM 6 THE COURT: OKAY. IF ONE OF YOU WOULD INDICATE THE

01:57PM 7 NUMBER OF JURORS, PROSPECTIVE JURORS THAT REMAIN.

01:57PM 8 MR. SCHENK: YOUR HONOR, THE REMAIN JURORS ARE: 14,

01:57PM 9 18, 26, 36, 44, 45, 48, 67, 79, 80, 82, 101, 102, 103, 108,

01:57PM 10 109, 113, 114, 115, 116, 117, 119, 125, 129, 131, 133, 134,

01:58PM 11 142, 143, 160, 161, 162, 163, 164, 165, 167, 169, 170, 179, AND

01:58PM 12 181.

01:58PM 13 THE COURT: THANK YOU.

01:58PM 14 MR. COOPERSMITH, DO YOU AGREE WITH THAT?

01:58PM 15 MR. COOPERSMITH: WE AGREE THAT THOSE ARE THE 40

01:58PM 16 JURORS THAT REMAIN AFTER ALL OF THE STRIKES, YOUR HONOR.

01:58PM 17 THE COURT: OKAY.

01:58PM 18 MR. COOPERSMITH: AND I DID WANT TO RAISE ONE THING

01:58PM 19 BEFORE WE START TO GO THROUGH THIS PROCESS.

01:58PM 20 SO AS YOUR HONOR REMEMBERS, ON WEDNESDAY I HAD MADE A

01:58PM 21 MOTION TO STRIKE THE FIRST PANEL BECAUSE I THOUGHT THEY WERE

01:58PM 22 TAINTED BASED ON COMMENTS MADE, AND I UNDERSTAND THE COURT

01:58PM 23 DENIED THAT MOTION.

01:58PM 24 AND, YOU KNOW, THIS WAS BECAUSE, YOU KNOW, JURORS HAD

01:58PM 25 BLURTED OUT THINGS LIKE THE TECHNOLOGY WAS IMPOSSIBLE TO DO ALL

01:59PM 1 TESTS WITH JUST ONE DROP, THAT IT'S A FRAUD, IT'S A FRAUDULENT

01:59PM 2 COMPANY, ONE JUROR SAID IT WAS A SENSE OF BETRAYAL WHEN THINGS

01:59PM 3 ARE MISUSED IN THE MEDICAL WORLD.

01:59PM 4 THESE WERE THE TYPES OF COMMENTS THAT WE WERE CONCERNED

01:59PM 5 ABOUT. I KNOW THE COURT DENIED THE MOTION.

01:59PM 6 WHAT WE THINK MIGHT BE ANOTHER REMEDY, ALTHOUGH WE STILL

01:59PM 7 STAND BY THAT MOTION, DESPITE THE COURT DENYING IT, WE

01:59PM 8 RESPECTFULLY DISAGREE WITH IT, WE THINK ANOTHER REMEDY WHICH

01:59PM 9 MIGHT MAKE THINGS A LITTLE FAIRER, BECAUSE I THINK THE PROCESS

01:59PM 10 ON THURSDAY, YESTERDAY, WENT A LITTLE MORE SMOOTHLY, IS TO FILL

01:59PM 11 THE BOX WITH THESE 40 JURORS STARTING FROM THE SECOND PANEL

01:59PM 12 RATHER THAN THE FIRST PANEL; AND THERE'S NO -- OBVIOUSLY THE

01:59PM 13 JURORS WHO HAD LOWER NUMBERS WHO WERE IN THE FIRST PANEL, THAT

01:59PM 14 WAS RANDOMLY ASSIGNED BY THE CLERK.

01:59PM 15 I DO ACKNOWLEDGE THAT NOW THAT WE KNOW SOMETHING ABOUT AT

01:59PM 16 LEAST A LOT OF THESE JURORS, WE ARE, IF WE WENT THIS WAY, ARE

01:59PM 17 MAKING A DECISION THAT THAT WOULD BE -- YOU KNOW, MAYBE WE'RE

02:00PM 18 PUTTING A LITTLE MORE WEIGHT ON WHAT WE KNOW ABOUT THE SECOND

02:00PM 19 PANEL.

02:00PM 20 NOTWITHSTANDING THAT, THOUGH, I THINK IT WOULD BE ANOTHER

02:00PM 21 WAY TO GET THE PROCESS MOVING, TO PICK THE JURY, BUT AT LEAST

02:00PM 22 PROVIDE SOME REMEDY FOR WHAT WE AT LEAST SAW ON THE FIRST DAY

02:00PM 23 AND SOME PROBLEMS WITH TAINT OF THE PANEL.

02:00PM 24 THE COURT: OKAY.

02:00PM 25 MR. SCHENK.

02:00PM 1 MR. SCHENK: YOUR HONOR, THE GOVERNMENT OPPOSES

02:00PM 2 THAT.

02:00PM 3 THERE IS A RANDOMNESS, THE USE OF COMPUTERS TO SELECT THE

02:00PM 4 VENIRE, TO SEND OUT THE SUMMONS, TO INVITE JURORS IN, AND IT'S

02:00PM 5 THROUGH THAT PROCESS THAT NUMBERS ARE APPLIED TO EACH JUROR.

02:00PM 6 AND TO NOW SORT OF USE HUMAN INTERVENTION TO PUT A THUMB

02:00PM 7 ON THE SCALE AND REORDER THE PANELS AFFECTS THE RANDOMNESS THAT

02:00PM 8 IS IMPORTANT IN THE PROCESS OF SELECTING JURORS. THE

02:00PM 9 RANDOMNESS AVOIDS BIAS OR OTHER THINGS FROM ENTERING INTO THE

02:00PM 10 ORDERING OF THE JURORS.

02:00PM 11 THE COURT GOT THE RULING CORRECT WHEN IT DENIED THE

02:01PM 12 DEFENSE'S MOTION TO STRIKE THE ENTIRE DAY ONE PANEL, AND

02:01PM 13 BECAUSE THE COURT GOT THAT RULING CORRECT, THERE IS NO NEED TO

02:01PM 14 MAKE ANY CHANGES OR INTERVENTIONS.

02:01PM 15 AND EVEN THE PROPOSAL BY THE DEFENSE BY PUTTING PANEL 2 IN

02:01PM 16 FRONT OF PANEL 1 STILL CREATES THE OPPORTUNITY THROUGH THE USE

02:01PM 17 OF STRIKES TO GO INTO PANEL NUMBER 1.

02:01PM 18 SO IF THERE IS SOME INFECTION THAT OCCURRED THROUGH THE

02:01PM 19 BLURTING OUT OF STATEMENTS, THIS DOESN'T SOLVE THAT.

02:01PM 20 SO IT'S AN INEFFECTIVE, INAPPROPRIATE SOLUTION TO A

02:01PM 21 NONEXISTENT PROBLEM, AND THAT'S WHY THE GOVERNMENT BELIEVES

02:01PM 22 THAT THE COURT SHOULD NOT REORDER THE PANELS.

02:01PM 23 MR. COOPERSMITH: YOUR HONOR, I AGREE IT DOESN'T

02:01PM 24 SOLVE IT. IT MITIGATES IT, AND THAT WAS THE REASON FOR THE

02:01PM 25 SUGGESTION.

02:01PM 1 THE COURT: SURE. OKAY. THANK YOU.

02:01PM 2 WELL, ABSENT A STIPULATION FROM THE PARTIES TO DO THAT,

02:01PM 3 I'M NOT GOING TO DO THAT, MR. COOPERSMITH. I THINK THAT REALLY

02:01PM 4 WOULD, IN ESSENCE, INTERJECT THE COURT INTO THE SELECTION

02:02PM 5 PROCESS OF THE LAWYERS BY ASKING THE COURT TO MAKE A

02:02PM 6 DETERMINATION OUTSIDE OF RANDOMNESS FOR WHATEVER REASON,

02:02PM 7 PREFERENTIAL REASON, AND I JUST, I THINK THAT'S CONTRARY TO THE

02:02PM 8 THEORY AND SPIRIT OF RANDOM SELECTION OF JURORS RESPECTING THE

02:02PM 9 PEREMPTORY CHALLENGES.

02:02PM 10 WE'VE HAD THE CAUSE PORTION, AND THE COURT HAS HEARD CAUSE

02:02PM 11 AND HARDSHIP FROM BOTH SIDES AND HAS MADE ITS DECISION ON

02:02PM 12 THOSE. THAT'S PART OF THE PROCESS.

02:02PM 13 I THINK TO CHANGE THAT NOW WOULD BE INAPPROPRIATE. I DO

02:02PM 14 BELIEVE IT WOULD BE INAPPROPRIATE TO ADJUST THAT ABSENT A

02:02PM 15 STIPULATION OF THE PARTIES WITH ANYTHING MORE, AND I DON'T HEAR

02:02PM 16 ONE. SO I'M GOING TO DECLINE YOUR INVITATION TO DO THAT.

02:03PM 17 WE'LL BEGIN THE SELECTION PROCESS. YOU WILL HAVE THE FORM

02:03PM 18 HANDED TO YOU BY OUR COURTROOM DEPUTY, AND THEN YOU CAN PASS

02:03PM 19 THE SHEET BACK AND FORTH.

02:03PM 20 ANY QUESTIONS ABOUT THAT PROCESS?

02:03PM 21 MR. SCHENK: YOUR HONOR, ONE CLARIFICATION.

02:03PM 22 MY RECOLLECTION IS THAT THE COURT REQUIRES ALL STRIKES TO

02:03PM 23 OCCUR WITHIN THE BOX, SO THAT THE FIRST 12 JURORS, YOU HAVE TO

02:03PM 24 ESSENTIALLY DRAW AN IMAGINARY LINE IN YOUR MIND --

02:03PM 25 THE COURT: THAT'S RIGHT.

02:03PM 1 MR. SCHENK: -- AND NOT STRIKE JUROR 15, FOR
02:03PM 2 INSTANCE, WITH YOUR VERY FIRST STRIKE.

02:03PM 3 THE COURT: THAT'S RIGHT. THE WAY IT WORKS IS THAT
02:03PM 4 THERE'S ALWAYS -- SO THIS FIRST -- WHAT YOU'RE DOING NOW IS
02:03PM 5 SELECTING THE 12 MEMBERS OF THE JURY WHO WILL HEAR THE CASE.

02:03PM 6 WE'LL THEN MOVE INTO ALTERNATES. SO THERE'S ALWAYS A
02:03PM 7 BENCH, IF YOU WILL, OF 12, AND YOUR STRIKES MUST BE 1 THROUGH
02:03PM 8 12 INITIALLY. YOU CAN'T SAY, I'LL STRIKE 15 INITIALLY.

02:04PM 9 IF THERE ARE STRIKES IN THAT 12, THEN 13 MOVES IN
02:04PM 10 VIRTUALLY, AND I'LL ASK YOU TO DO THAT IN A CENTIPEDE FASHION,
02:04PM 11 I'LL CALL IT THAT, TO VIRTUALLY MOVE IN THE NEXT PERSON TO FILL
02:04PM 12 THAT SPOT.

02:04PM 13 DOES THAT MAKE SENSE?

02:04PM 14 MR. COOPERSMITH: YES, YOUR HONOR.

02:04PM 15 SO TO MAKE SURE I UNDERSTAND, ONCE A JUROR FILLS A SPOT IN
02:04PM 16 THE 12 IN THE VIRTUAL BOX, THAT JUROR IS ELIGIBLE TO BE STRUCK
02:04PM 17 WITH A PEREMPTORY?

02:04PM 18 THE COURT: CORRECT.

02:04PM 19 MR. COOPERSMITH: AND THEN THE SAME PROCESS I ASSUME
02:04PM 20 WOULD WORK WITH THE SIX ALTERNATES WHERE WE WOULD BASICALLY
02:04PM 21 VIRTUALLY HAVE A BOX OF SIX; IS THAT RIGHT.

02:04PM 22 THE COURT: YES. DOES THAT HELP YOU?

02:04PM 23 MR. SCHENK: YES.

02:04PM 24 THE COURT: ARE YOU READY TO BEGIN THAT PROCESS?

02:04PM 25 MR. SCHENK: YES, YOUR HONOR.

02:04PM 1 MR. COOPERSMITH: YES, YOUR HONOR.

02:04PM 2 THE COURT: OKAY. I'LL ASK OUR COURTROOM DEPUTY IN

02:04PM 3 JUST A MOMENT TO HAND YOU THE SHEET THAT WE HAVE PREPARED.

02:04PM 4 (DISCUSSION OFF THE RECORD.)

02:09PM 5 THE COURT: COUNSEL, I ALSO WANT TO LET YOU KNOW

02:09PM 6 THAT ONCE WE SECURE THE JURY AND ALTERNATES TODAY, MY INTENT IS

02:09PM 7 TO HAVE THEM COME BACK AND WE'LL SEE IF WE CAN GET THEM HERE

02:09PM 8 MONDAY FOR SWEARING IN IF THAT'S POSSIBLE.

02:09PM 9 IF NOT, WE'LL DO THAT TUESDAY FIRST THING.

02:09PM 10 BUT IT'S MY INTENT NOT TO RELEASE OUR THIRD PANEL JUST OUT

02:09PM 11 OF AN ABUNDANCE OF CAUTION. SO I'M NOT GOING TO RELEASE THE

02:09PM 12 THIRD PANEL UNTIL WE'VE SWORN IN OUR PANEL AND OUR ALTERNATES.

02:09PM 13 MR. COOPERSMITH: YES, YOUR HONOR.

02:09PM 14 MR. SCHENK: THANK YOU.

02:09PM 15 THE COURT: AND THEN WE'LL SEE IF WE CAN BRING THEM

02:09PM 16 IN MONDAY DEPENDING ON THE TIMING.

02:09PM 17 MR. COOPERSMITH: THANK YOU.

02:10PM 18 MR. SCHENK: SWEARING IN WOULD BE THE ONLY THING ON

02:10PM 19 MONDAY?

02:10PM 20 THE COURT: CORRECT. YES, THAT'S CORRECT.

02:10PM 21 (PAUSE IN PROCEEDINGS.)

02:10PM 22 MR. SCHENK: JUST FOR CLARIFICATION, YOUR HONOR,

02:10PM 23 WE'VE BEEN USING NUMBERS, JUROR NUMBERS.

02:10PM 24 THE TOP HALF OF THE SHEET HAS A LINE ON IT WHERE WE WRITE

02:10PM 25 OUR STRIKES. I WANT TO CONFIRM THAT WE JUST WRITE NUMBERS ON

02:11PM 1 THE LINE.

02:11PM 2 I CAN PASS IT UP.

02:11PM 3 THE CLERK: INSTEAD OF THEIR NAME.

02:11PM 4 THE COURT: I THINK THAT'S SUFFICIENT. AS LONG AS

02:11PM 5 EVERYBODY KNOWS, RIGHT. YOU DON'T HAVE TO WRITE OUT THEIR

02:11PM 6 NAMES, RIGHT.

02:11PM 7 IF YOU PUT THE NUMBERS DOWN, THAT'S SUFFICIENT.

02:11PM 8 MR. COOPERSMITH: YES, YOUR HONOR.

02:11PM 9 THE COURT: DO YOU UNDERSTAND THAT, MR. COOPERSMITH?

02:11PM 10 MR. COOPERSMITH: YES.

02:11PM 11 THE COURT: THANK YOU.

02:11PM 12 MR. SCHENK: I'M SORRY. YOUR HONOR ALSO TOLD US THE

02:11PM 13 OTHER DAY, IF WE PASS, WE DO NOT LOSE THE STRIKE UNLESS THE

02:11PM 14 OTHER SIDE PASSES, AND THEN THAT MEANS WE HAVE A JURY OR WE

02:11PM 15 HAVE A GROUP OF ALTERNATES.

02:11PM 16 THE COURT: THAT'S CORRECT. A PASS IS NOT A STRIKE.

02:11PM 17 THAT DOESN'T SUBTRACT FROM YOUR STRIKES.

02:11PM 18 TWO PASSES IN SUCCESSION MEANS WE HAVE A JURY.

02:11PM 19 MR. COOPERSMITH: YES, YOUR HONOR.

02:11PM 20 MR. SCHENK: THANK YOU, YOUR HONOR.

02:11PM 21 (PAUSE IN PROCEEDINGS.)

02:27PM 22 THE COURT: COUNSEL, I JUST WANT TO INTERRUPT YOUR

02:27PM 23 PROCESS FOR JUST A MOMENT.

02:27PM 24 I JUST WANT TO BE CERTAIN THAT I WAS CLEAR. RIGHT NOW

02:27PM 25 WE'RE DOING THE 12, THE 12 MEMBERS OF THE JURY.

02:27PM 1 IF AND WHEN YOU REACH THAT 12, THEN PLEASE LET ME KNOW AND
02:27PM 2 WE'LL STOP, AND WE'LL MEMORIALIZE THAT, AND THEN WE'LL GO
02:27PM 3 FORWARD.

02:27PM 4 MR. COOPERSMITH: YES, YOUR HONOR.

02:27PM 5 THE COURT: WAS THAT YOUR UNDERSTANDING?

02:28PM 6 MR. COOPERSMITH: YES, YOUR HONOR. THANK YOU.

02:28PM 7 MR. SCHENK: YES.

02:28PM 8 THE COURT: GREAT. THANK YOU. SORRY TO INTERRUPT.

02:28PM 9 (PAUSE IN PROCEEDINGS.)

02:54PM 10 THE COURT: WE'RE BACK ON THE RECORD. ALL PARTIES
02:55PM 11 PREVIOUSLY PRESENT ARE PRESENT ONCE AGAIN.

02:55PM 12 MR. SCHENK?

02:55PM 13 MR. SCHENK: YOUR HONOR, WE HAVE A JURY. THE
02:55PM 14 GOVERNMENT HAS PASSED IT'S FINAL TWO, AND I WONDER IF I SHOULD
02:55PM 15 WRITE "PASS" IN. WE HAVE LEFT IT BLANK IN THE EVENT THE
02:55PM 16 GOVERNMENT USED THOSE FINAL TWO, BUT WE HAVE A JURY NOW, SO --
02:55PM 17 THE COURT: SURE, WHY DON'T YOU WRITE THAT IN.
02:55PM 18 IS THAT ALL RIGHT WITH YOU, MR. COOPERSMITH?
02:55PM 19 MR. COOPERSMITH: YES, YOUR HONOR.
02:55PM 20 THE COURT: OKAY.
02:55PM 21 MR. SCHENK: SHOULD I PASS THAT UP?
02:55PM 22 THE COURT: YES, IF YOU COULD HAND IT UP TO OUR
02:55PM 23 COURTROOM DEPUTY.
02:55PM 24 IF YOU COULD JUST CHECK THAT AGAINST YOUR LIST.
02:56PM 25 (PAUSE IN PROCEEDINGS.)

02:59PM 1 THE COURT: ALL RIGHT. THANK YOU.

02:59PM 2 OUR COURTROOM DEPUTY HAS RECEIVED THE WORK PRODUCT OF

02:59PM 3 COUNSEL ON THEIR STRIKES, AND I'M GOING TO ASK OUR COURTROOM

02:59PM 4 DEPUTY TO READ, BY JUROR NUMBER, THE MAKEUP OF THE 12 JURORS.

03:00PM 5 SO IT WILL BE -- THE FIRST NAME ON THE LIST WOULD BE JUROR

03:00PM 6 NUMBER 1 WILL SIT IN THAT SEAT, AND SO FORTH.

03:00PM 7 SO PLEASE LISTEN TO THESE NUMBERS TO SEE IF IT

03:00PM 8 CORRESPONDS, COUNSEL, WITH YOUR CALCULATION.

03:00PM 9 SO, MADAM CLERK, IF YOU COULD PLEASE READ THE NUMBERS OF

03:00PM 10 THE JURY.

03:00PM 11 THE CLERK: JUROR NUMBER 26 WILL BE JUROR NUMBER 1;

03:00PM 12 JUROR NUMBER 67 WILL BE JUROR NUMBER 2;

03:00PM 13 JUROR NUMBER 101 WILL BE JUROR NUMBER 3;

03:00PM 14 JUROR NUMBER 102 WILL BE JUROR NUMBER 4;

03:01PM 15 JUROR NUMBER 108 WILL BE JUROR NUMBER 5;

03:01PM 16 JUROR NUMBER 109 WILL BE JUROR NUMBER 6;

03:01PM 17 JUROR NUMBER 114 WILL BE JUROR NUMBER 7;

03:01PM 18 JUROR NUMBER 116 WILL BE JUROR NUMBER 8;

03:01PM 19 JUROR NUMBER 125 WILL BE JUROR NUMBER 9;

03:01PM 20 JUROR NUMBER 129 WILL BE JUROR NUMBER 10;

03:01PM 21 JUROR NUMBER 131 WILL BE JUROR NUMBER 11;

03:01PM 22 AND JUROR NUMBER 133 WILL BE JUROR NUMBER 12.

03:01PM 23 THE COURT: DOES THAT COMPORT WITH YOUR

03:01PM 24 CALCULATIONS, MR. SCHENK?

03:01PM 25 MR. SCHENK: YES, IT DOES.

03:02PM 1 THE COURT: MR. COOPERSMITH?

03:02PM 2 MR. COOPERSMITH: YES.

03:02PM 3 THE COURT: THANK YOU.

03:02PM 4 THOSE NUMBERS WILL COMPROMISE THE 12 JURORS WHO WILL SIT

03:02PM 5 IN THE BOX, THE 12 JURORS.

03:02PM 6 SHALL WE NOW MOVE TO THE SELECTION OF THE ALTERNATES? AND

03:02PM 7 THERE ARE SIX ALTERNATES, AND SO THE FOLLOWING, WHOEVER IS LEFT

03:02PM 8 IN SUCCESSION WILL BE THE UNIVERSE OF THOSE SELECTIONS, AND YOU

03:02PM 9 HAVE THREE STRIKES EACH.

03:02PM 10 THE SAME RULES APPLY. A PASS IS NOT A STRIKE; TWO PASSES

03:02PM 11 AND WE HAVE OUR ALTERNATE JURORS.

03:02PM 12 MR. SCHENK: YES, YOUR HONOR.

03:02PM 13 MR. COOPERSMITH: YES, YOUR HONOR.

03:02PM 14 THE COURT: DO YOU HAVE A SHEET TO BEGIN THAT?

03:02PM 15 MR. SCHENK: SHOULD WE GET THE SHEET BACK? I THINK

03:02PM 16 WE USE THE SAME.

03:02PM 17 THE COURT: YEAH, I THINK YOU CAN. IT MAKES MORE

03:02PM 18 SENSE TO DO THAT.

03:14PM 19 (PAUSE IN PROCEEDINGS.)

03:18PM 20 THE COURT: ALL RIGHT. LET'S GO BACK ON THE RECORD.

03:18PM 21 MR. SCHENK, MR. COOPERSMITH, HAVE YOU COMPLETED YOUR

03:19PM 22 SELECTION FOR THE ALTERNATE JURORS?

03:19PM 23 MR. SCHENK: YES, YOUR HONOR.

03:19PM 24 MR. COOPERSMITH: YES, YOUR HONOR.

03:19PM 25 THE COURT: ALL RIGHT. THANK YOU.

03:19PM 1 OUR COURTROOM DEPUTY WILL COMPILE THAT LIST AND THEN READ

03:19PM 2 THAT OUT TO YOU FOR US.

03:19PM 3 (PAUSE IN PROCEEDINGS.)

03:19PM 4 THE CLERK: JUROR NUMBER 134 WILL BE ALTERNATE JUROR

03:19PM 5 NUMBER 1;

03:19PM 6 JUROR NUMBER 142 WILL BE ALTERNATE JUROR NUMBER 2;

03:19PM 7 JUROR NUMBER 164 WILL BE ALTERNATE JUROR NUMBER 3;

03:19PM 8 JUROR NUMBER 167 WILL BE ALTERNATE JUROR NUMBER 4;

03:19PM 9 JUROR NUMBER 169 WILL BE ALTERNATE JUROR NUMBER 5;

03:20PM 10 JUROR NUMBER 170 WILL BE ALTERNATE JUROR NUMBER 6.

03:20PM 11 THE COURT: MR. SCHENK, DOES THAT COMPORT WITH YOUR

03:20PM 12 COMPILATION?

03:20PM 13 MR. SCHENK: YES, YOUR HONOR.

03:20PM 14 THE COURT: MR. COOPERSMITH?

03:20PM 15 MR. COOPERSMITH: YES, YOUR HONOR.

03:20PM 16 THE COURT: ALL RIGHT. THANK YOU.

03:20PM 17 THEN THOSE JURORS WILL BE SELECTED AS OUR CHOSEN ALTERNATE

03:20PM 18 JURORS. I'LL ASK OUR COURT COMMISSIONER TO ASK THE 12 AND THE

03:20PM 19 6 TO APPEAR THE NEXT COMING MONDAY. IS THAT THE 14TH I THINK

03:20PM 20 IT IS?

03:20PM 21 THE CLERK: IT IS.

03:20PM 22 THE COURT: SHOULD WE HAVE THEM COME IN AT

03:20PM 23 10:00 A.M., COUNSEL?

03:20PM 24 MR. COOPERSMITH: THAT WOULD BE FINE.

03:20PM 25 MR. SCHENK: YES, YOUR HONOR.

03:20PM 1 THE COURT: ALL RIGHT. WHAT I INTEND TO DO IS TO
03:20PM 2 SWEAR THEM AS A JUROR AND THE ALTERNATE JURORS.
03:20PM 3 I'M JUST CURIOUS, IF WE HAVE TIME, PERHAPS I'LL
03:20PM 4 PRE-INSTRUCT ON MONDAY AS WELL, AND THEN ON WEDNESDAY WE CAN
03:21PM 5 JUST BEGIN WITH YOUR OPENING STATEMENTS.
03:21PM 6 WOULD THAT WORK?
03:21PM 7 MR. SCHENK: I THINK IT WAS TUESDAY, YOUR HONOR.
03:21PM 8 THE COURT: TUESDAY. I'M SORRY.
03:21PM 9 MR. SCHENK: YES, THAT WOULD BE FINE.
03:21PM 10 THE COURT: THE PRELIMINARY INSTRUCTIONS ARE
03:21PM 11 20 MINUTES.
03:21PM 12 MR. COOPERSMITH: YOUR HONOR, I DON'T HAVE ANY
03:21PM 13 PROBLEM WITH THAT.
03:21PM 14 THE COURT: OKAY. LET'S SEE WHAT OUR TIME IS.
03:21PM 15 THAT WOULD ALLOW ME -- IN THE PRELIMINARY INSTRUCTIONS, AS
03:21PM 16 YOU KNOW, IT DOES HAVE THE ADMONITION, AND I'M THINKING IT
03:21PM 17 MIGHT BE WISE TO GIVE THEM AN ADMONITION BEFORE THEY LEAVE.
03:21PM 18 SO I'LL PLAN ON DOING THAT. I HOPE WE CAN ACCOMPLISH THAT
03:21PM 19 TIMEWISE.
03:21PM 20 MR. COOPERSMITH: BUT OPENING STATEMENTS WILL HAVE
03:21PM 21 TO BE TUESDAY?
03:21PM 22 THE COURT: YES, YOU WON'T HAVE TO OPEN ON MONDAY.
03:21PM 23 RIGHT. OKAY.
03:21PM 24 MR. COOPERSMITH: THANK YOU.
03:21PM 25 THE COURT: ANYTHING ELSE BEFORE WE BREAK?

03:21PM 1 MR. SCHENK: NO. THANK YOU, YOUR HONOR.

03:21PM 2 MR. COOPERSMITH: NO, YOUR HONOR.

03:21PM 3 THE COURT: ALL RIGHT. THANK YOU. HAVE GOOD

03:21PM 4 WEEKENDS. GET PLENTY OF SLEEP.

03:21PM 5 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

03:21PM 6 THE COURT: AND WE'LL NOTIFY OUR COMMISSIONER TO

03:21PM 7 NOTIFY THESE JURORS.

03:21PM 8 I'M NOT GOING TO RELEASE THE THIRD PANEL YET. LET'S NOT,

03:22PM 9 AND PLEASE BE SPECIFIC, THAT WE'RE NOT GOING TO RELEASE THAT

03:22PM 10 PANEL.

03:22PM 11 THE CLERK: OKAY.

03:22PM 12 THE COURT: AND WE'LL SEE WHAT HAPPENS.

03:22PM 13 MR. SCHENK: ALSO, ARE WE JUST GOING TO SAY NOTHING

03:22PM 14 TO JUROR 179 AND 181 BECAUSE THE PARTIES DID NOT USE ALL OF

03:22PM 15 THEIR STRIKES, WE DID NOT NEED ALL 40 JURORS?

03:22PM 16 SO I THINK IF WE'RE NOT GOING TO RELEASE THE THIRD PANEL,

03:22PM 17 WE MIGHT AS WELL NOT SAY SOMETHING TO 179 AND 181 AT THIS

03:22PM 18 POINT.

03:22PM 19 THE COURT: THAT'S RIGHT, THEY'RE STILL PART OF THE

03:22PM 20 MIX POTENTIALLY, SHOULD THERE BE A NEED THEY WOULD FOLLOW NEXT.

03:22PM 21 MR. SCHENK: THANK YOU.

03:22PM 22 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

03:22PM 23 THE CLERK: COURT IS ADJOURNED.

03:22PM 24 (COURT ADJOURNED AT 3:22 P.M.)

03:22PM 25

1
2
3 CERTIFICATE OF REPORTERS
4
5
6

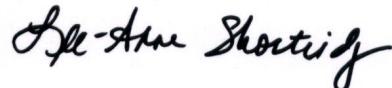
7 WE, THE UNDERSIGNED OFFICIAL COURT REPORTERS OF THE
8 UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
9 CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO
10 HEREBY CERTIFY:

11 THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS
12 A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
13 ABOVE-ENTITLED MATTER.

14 
15

16

IRENE RODRIGUEZ, CSR, CRR
17 CERTIFICATE NUMBER 8076
18



19

LEE-ANNE SHORTRIDGE, CSR, CRR
20 CERTIFICATE NUMBER 9595
21

22 DATED: MARCH 11, 2022
23
24
25